

The Distributive Constitution and Workers' Rights

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I. INTRODUCTION

Progressives have forgotten how to think about the constitutional dimensions of economic life. In the thick of a grave economic crisis, that is unfortunate. Work, livelihoods, and opportunity; material security and insecurity; poverty and dependency; union organizing, collective bargaining, and workplace democracy: for generations of American reformers, their constitutional importance was self-evident. Laissez-faire, unchecked corporate power, and the deprivations and inequalities they bred were not just bad public policy—they were constitutional infirmities. Today, with the important exception of employment discrimination, these concerns have vanished from progressives' constitutional landscape.

Attacks on public employees' collective bargaining rights in Ohio, Wisconsin and other states provoked large scale protests but struck few constitutional chords among progressives. We have all but forgotten that in the mid-twentieth century, lawmakers and courts deemed these fundamental rights and inscribed them in once-sturdy, but now ramshackle, framework statutes. Likewise, right-wing attacks on Obamacare have prompted trenchant arguments for the constitutional permissibility of the individual mandate, but the progressive idea—that healthcare and other essential forms of social insurance are basic rights—has largely slipped away. The very notion that the Constitution speaks to the shape of our political economy or the distribution of initial endowments has come to seem a shibboleth of the far right: only libertarians can think that way! But that view is mistaken, as a matter of both history and principle.

Progressives lament that the right has co-opted the nation's public conversations about the Constitution. In organizations like the American Constitution Society and symposia like this one, we debate about the best progressive response. The debate is an odd one because so much of our attention rests on theories of interpretation and the way to respond to right-wing originalism. Some champion a left-wing originalism, rightly pointing out that progressives should not run from text and history. Others say progressives only look lame when they mimic originalists, pretending that text and history standing alone can clinch many of today's most important constitutional questions. Instead, they champion other traditional modes of constitutional interpretation. All sides in these progressive debates make good cases for the methods they champion. But they focus on method in isolation from substance. The reason conservatives dominate our constitutional debates is not so much

that they have a killer theory of interpretation that sells well with the public. It is chiefly that they have a bolder and clearer constitutional philosophy and narrative about what kind of nation the Constitution promises to promote and redeem. Originalists' theory of constitutional interpretation is bunk. But originalists are correct in their practical understanding of constitutional politics. Much of what lends originalism its public appeal is the narrative of a "traditional" nation that it promises to restore: an America dedicated to personal responsibility, limited government, private property, and godliness. This narrative has aroused citizens, lawmakers, and judges to act boldly on its behalf.

To prevail on behalf of their constitutional outlook and interpretations, progressives need a counter-narrative of their own—an account of past constitutional contests and commitments that adds up to a vision of the nation the Constitution promises to promote and redeem. That is what enables particular interpretations and arguments to tap into the broad popular pulse of keeping faith with our past. In what follows, I'll offer some reasons why we progressives have had such difficulty in recent decades assembling our own constitutional narrative. I'll sketch what shape that narrative can take. And I'll briefly suggest how the precepts that the narrative embodies apply to some present conflicts.

Progressives stand for gender equality, cultural diversity, and racial justice; they defend the rights of the most vulnerable. These substantive commitments resonate with the familiar progressive notion that judicial activism is warranted on behalf of relatively powerless or unpopular groups. But they don't tell us what kind of nation the Constitution promises to secure for *all* Americans. What kind of nation is it that must include all its members in the constitutional fold? Progressives' silence here may result from the fact that there are key elements of progressive politics whose constitutional salience progressives have forgotten.

We need to recall the progressive constitutional outlook on economic life because it supplies some of the unifying threads that our current discourse lacks. Such an outlook offers new doctrinal possibilities, but it does not call on courts to take heroic actions against the other branches. Rather, it reminds lawmakers that there are constitutional stakes in attending seriously to the economic needs of ordinary Americans, their dread of poverty and want, and their worries that our mounting inequalities are eroding our democracy and its promises of fairness and equal opportunity. In doing so, it provides a sturdier basis on which to uphold regulation and social provision that the right has begun—once more—to assail. At the same time, it offers a baseline of popular constitutional commitments to all Americans alongside the courts' necessary interventions on behalf of the most vulnerable.

We are all familiar with the *laissez-faire* tradition in American constitutional law and politics. Right-wing originalists are bent on reviving it. But there is an opposite tradition: the rich, reform-minded *distributive* tradition of constitutional law and politics. We need to remember this tradition, and to examine how it arrived at its present invisibility.

A. The Distributive Tradition Distilled

The distributive tradition is as old as the Constitution. Its gist is simple: gross economic inequality produces gross political inequality. You cannot have a constitutional republic, or what the Framers called a “republican form of government,” and certainly not a constitutional democracy, in the context of gross material inequality among citizens, for three reasons: (1) gross economic inequality produces an oligarchy in which the wealthy rule; (2) insofar as gross inequality produces a lack of basic social goods among many at the bottom, it also destroys the material independence and security that democratic citizens must have in order to think and act on their own behalf and participate on a roughly equal footing in the polity and the larger society; and (3) access to basic goods like education and livelihoods is essential to standing and respect in one’s own eyes and in the eyes of the community.

B. The Dual Significance of Labor Rights

Collective bargaining rights, like those under attack in Congress and state legislatures, are also part of this distributive tradition—call them labor rights or labor freedoms. In view of the battles over these rights that are unfolding today here in Ohio, this Article will focus chiefly on them.

This Article will suggest that the increasingly enfeebled state of labor rights over the past few decades has played a major role in producing a crisis of social rights. Infirm labor rights contributed substantially to the dwindling proportion of unionized workers in the private sector workforce—from 40% in the 1970s to less than 10% today. Unions turn out to have been the central guardians of social rights in our national politics. Thus, the dwindling of unions did more than deprive workers of voice and clout in the workplace; it also weakened the clout of working people in Congress and state legislatures. From the New Deal onward, unions have done the heavy lifting when it comes to electing (and keeping pressure on) state and national lawmakers who have supported progressive tax policies, more generous unemployment benefits, Medicaid and Medicare, and the broad distribution of the risks and rewards of economic life that characterized mid-century America. More than any other factor, it may be the erosion of organized labor over the past few decades that explains Congress’s failures to counteract—as well as Congress’s positive contributions to—the growing inequalities and inequities of the past few decades. The process has resembled a slow motion disaster for constitutional democracy, as progressives understand it. Reinvigorating labor rights thus is both a constitutional good in itself and also may be a condition for redeeming the broader Distributive Constitution. Labor rights include the right to choose to bargain collectively with one’s employer, and along with that, also the right of “self-organization”—to organize with other employees in unions or other workplace associations and the right to engage in peaceful “concerted

activity”—withholding one’s labor or purchasing power and peacefully urging others to do the same.

Like social rights of access to basic goods, labor rights address severe economic inequality, domination, and dependency in the service of bedrock constitutional values: equal liberty and respect, dignity, freedom of expression and association, and republican self-rule.¹ Poverty and chronic lack of access to basic goods subvert those values, but the relations and conditions in which individuals work to obtain a livelihood also constitute an economic domain where liberty, dignity, and civic capacity are at stake. In that domain, not only slavery but all legally sanctioned forms of severe dependency and domination injure what the Framers of the Thirteenth and Fourteenth Amendments called the “dignity of free labor,” depriving individuals of the equal liberty and respect those amendments promise.²

Long ago in the *Lochner* Era, the Court acknowledged that individual rights to contract and to quit an unsatisfactory employer are not alone sufficient to safeguard this core understanding of economic liberty in modern America. Thus, in the 1930s, when it upheld for the first time affirmative protections for union organizing against employer interference and an affirmative duty on employers’ part to engage in collective bargaining, the Court declared:

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment³

In this same statute’s preamble, Congress announced the constitutional stakes. The labor rights enshrined in the statute were essential for workers to enjoy “actual liberty of contract” and “full freedom of association.”⁴

¹ While social rights are (somewhat misleadingly) often called “*positive* rights,” because they entail some affirmative duty to provide social goods, labor rights are chiefly seen (again, somewhat misleadingly) as “*negative* liberties”: freedoms from laws and other legally sanctioned public and private actions that suppress association, expression, and peaceful collective action. On the “positive” versus “negative” rights distinction, its kernel of good sense, and its misleading aspects, see STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 37–43 (1999).

² See *infra* notes 12–13. RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 159–73 (2007), considers the Justice Department’s mid-twentieth century efforts to use the Thirteenth Amendment to establish constitutionally grounded minimum labor standards. See also James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of “Involuntary Servitude,”* 119 YALE L.J. 1474 (2010) (calling for expanded use of the Thirteenth Amendment to combat severe labor domination and dependency and to support labor rights).

³ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

⁴ National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)).

Freedom of association and economic liberty remain labor rights' two constitutional touchstones. Much of what unions do involves core First Amendment activity: they assemble, hold meetings, deliberate and decide upon common goals; they choose representatives, who advocate and negotiate on members' behalf; they also speak out, banner, picket, and march urging fellow workers and members of the public to support their cause. While the Supreme Court has ruled otherwise, finding union activities and labor protests to be outside the First Amendment pale,⁵ liberal and progressive lawyers, lawmakers, reformers, and ordinary citizen-workers continue to see the close fit between these citizenly activities and the First Amendment's core commitments to democratic values and republican self-rule.⁶ And, surprisingly, the Court's views may be changeable.⁷

The economic liberty dimension of labor rights is more problematic, however, because it demands forthright attention to asymmetries of economic power. It treads back into a domain of economic regulation that—progressives often assume—the New Deal Constitution left wide open to the play of interest group politics and the discretion of policymakers. But as far as labor rights are concerned, that view is wrong. The framework labor law statutes of that era embodied a set of quasi-constitutional findings and judgments about the distributional consequences of the legal status quo.⁸ That status quo confined labor's freedom of economic action so narrowly as to make employers' bargaining power too great and labor's too meager on a constitutional scale. New Dealers enacted new safeguards to expand and protect that freedom. Striving to get the courts out of the business of determining the metes and bounds of labor rights, however, New Dealers assigned that task chiefly to a new administrative agency. But that, as we will see, was a far cry from believing that the Constitution was silent about it.⁹

⁵ See 81 CONG. REC. 2940 (1937) (statement of Sen. Wagner); *Judgment Day: Supreme Court Gives Its Blessing to Labor Relations Act and Hands Roosevelt a Victorious Defeat*, NEWSWEEK, Apr. 17, 1937, at 7 [hereinafter *Judgment Day*].

⁶ These aspects of civic activity and self-government in trade unionism and collective bargaining have led generations of reformers to argue that these institutions bring democracy to work and are essential to making workers citizens, and not subjects. Without effective labor rights, working Americans' everyday experience of power and authority risks becoming one of subjection, of being governed without a voice or a vote—a live counter-model to democracy in a sphere of life central to the formation of personal identity, community, and citizenship. You cannot keep a “republican form of government” in modern America, declared the architects of our labor laws, without a measure of economic democracy. See *infra* notes 55–56.

⁷ See *infra* notes 57–59.

⁸ See *infra* notes 20–22.

⁹ See *infra* notes 19–20.

C. Why Not State-Enforced Social Rights All the Way Down?

Today, as in the early twentieth century, across a significant swath of the labor market, the legal status quo has rendered employers' power too great and workers' power too meager on a constitutionally significant scale.¹⁰ Progressive labor and employment law scholars and policymakers today yearn to revisit the New Deal framework statutes and institutional division of labor.¹¹ Of course, insofar as wages and many aspects of working conditions are concerned, state-enforced regulations may do the work, apart from what we here call labor rights. But such state regulations cannot supplant workers' right to some voice at the workplace and the dignity and freedom it brings. Nor do they provide the associational structures and aggregation of interests and votes that enable unions to promote pro-poor and pro-worker public policies. Moreover, most liberal-minded progressive thinkers continue to see some form of collective bargaining or worker participation in the firm as an indispensable system of private ordering: a way to remedy the great inequality of bargaining power between the individual employee and the corporate employer without heavy-handed state determination of the substantive terms of an employment contract. The parties to the contract are in a far better position than the state to hammer out a fair division of the pie and to balance fairness and efficiency in the operations of the enterprise.

Some progressives today champion legally-mandated forms of worker participation and labor representation built up inside firms independent of trade unions, or with unions playing a new and more resolutely cooperative rather than adversarial role.¹² Others, we will see, hope to rekindle traditional unionism and collective bargaining, and many of them hope to see courts play a much larger role.¹³ Some hope instead to revive an older labor reform ideal of "collective laissez-faire" via a "grand bargain" with broader freedom of collective action exchanged for fewer legal safeguards than exist under the present NLRB keeping established unions insulated from challenge.¹⁴ Still others suggest that our laws should offer employers a choice: either adopt robust and effective worker participation and representation measures in your

¹⁰ See *infra* notes 39–42.

¹¹ See Cynthia L. Estlund, *The Death of Labor Law?*, 2 ANN. REV. L. & SOC. SCI. 105, 116–17 (2006).

¹² See CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 168–85 (2010).

¹³ *Id.* at 164–68; see also ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* 51–55 (2006). Cynthia Estlund sketches a proposal for private rights of action in Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1551–58 (2002); Alan Hyde, *Exclusion is Forever: How Keeping Labour Rights Separate from Constitutional Rights Has Proven to Be a Bad Deal for American Trade Unions and Constitutional Law*, 15 CANADIAN LAB. & EMP. L.J. 251 (2010). See *infra* notes 41–42, 53–54, 56–59 for discussion.

¹⁴ See Brishen Rogers, *Passion and Reason in Labor Law*, 47 HARV. C.R.-C.L. L. REV. (forthcoming 2012).

business, or submit to a reinvigorated framework of union representation.¹⁵ In championing, defending and, one day, interpreting any of these reforms, First Amendment/freedom of association norms alone will not be sufficient to make a compelling (or even a coherent) case. It will be important to rely on both constitutional touchstones: not only the First Amendment but also the free labor tradition and the Distributive Constitution's account of how workers' freedom and dignity may be constitutionally injured by extreme inequalities in bargaining power employers enjoy in virtue of the existing legal rules of the game.

All these ideas to address the present impasse face severe political headwinds. Most are extremely unlikely to be enacted unless the labor movement again takes on the aspect of a civil rights movement.¹⁶ Meanwhile, progressives need to be arguing that there are constitutional stakes in overcoming the problems and injustices that the ideas aim to ameliorate. And we need a counter-narrative about our past constitutional struggles and commitments to show how and why that is so. Here is a ruthlessly condensed account of the history of the Distributive Constitution. Following that, I will return to the problems and prospects of the present and to those precincts of organized labor that show signs of becoming just that: a new civil rights movement.

II. THE DISTRIBUTIVE CONSTITUTION: 1787–2011

A. *The Antebellum Constitution*

The Framers believed that personal liberty and political equality demanded a measure of economic independence and material security.¹⁷ They declared that the new national Constitution, plus equality of rights and liberty at the state level, would ensure that measure for all hard-working white men and their families.¹⁸ This was why democratic-minded figures like Tom Paine and his plebian followers supported the new Constitution.¹⁹ As long as the law played no favorites and secured everyone's private rights to make contracts and own property, they believed, the new republic's plentiful land and expanding markets might ensure that today's youthful hireling would be tomorrow's independent farmer or artisan.²⁰ Even so, not only Paine but James Madison and Thomas Jefferson included in their respective drafts of—and proposals for—

¹⁵ See David J. Doorey, *Decentring Labour Law* 37–38, 40–41 (unpublished manuscript), available at <http://ssrn.com/abstract=1625044>.

¹⁶ See *infra* notes 53–56.

¹⁷ See Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1329 (1987).

¹⁸ See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 26–28 (1999).

¹⁹ ERIC FONER, *TOM PAINE AND REVOLUTIONARY AMERICA* 141 (2005).

²⁰ See Forbath, *supra* note 18, at 28.

state constitutions' guarantees of key initial endowments that they thought necessary to enable all classes of white men to achieve a measure of citizenly independence and competence: free schools and a right to fifty acres of public land, for example.²¹

B. Reconstruction

Eighty years later, this same political economy of citizenship animated the Fourteenth Amendment. Its main aim was to give African-American men the same rights of contract and property that were thought to ensure white men the opportunity to pursue a calling and earn a decent livelihood.²² Once more, distributive concerns imbued the Framers' understandings. Some, like Thaddeus Stevens, famously insisted on "forty acres and a mule" as an endowment Congress was not only authorized but obliged to provide the ex-slave in order to bring to earth the Amendment's promise of equal rights.²³ Others, unwilling to expropriate the plantations, merely insisted on schools, which the federal Freedmen's Bureau briefly supplied.²⁴ These distributive ideas about equal citizenship were not limited to former slaves. Lincoln and the other leaders of the Republican Party during the Civil War held that "equal rights" for white hirelings in the North demanded more than equal legal rights to contract and own property; they also insisted on a fair distribution of initial endowments: free homesteads as well as federal land grant funded state colleges, alongside free elementary and secondary education.²⁵ They thought, in Akhil Amar's apt

²¹ In Jefferson's draft constitution for Virginia, he included under "Rights Private and Public," a provision that "[e]very person of full age . . . shall be entitled to an appropriation of 50 acres [of land] . . . in full and absolute dominion . . ." Thomas Jefferson, *Draft Constitution for Virginia*, in THE PORTABLE THOMAS JEFFERSON 242, 248 (Merrill D. Peterson ed., 1975). Madison and Jefferson also emphasized education and, for those lacking initiative, the workhouse. See DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 202–05 (1989).

²² Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 474–75 (1988).

²³ For example,

In a speech to Pennsylvania's Republican convention in September 1865, Stevens called for the seizure of the 400 million acres belonging to the wealthiest 10% of Southerners. Forty acres would be granted to each adult freedman and the remainder—some 90% of the total—sold 'to the highest bidder,' in plots, he later added, no larger than 500 acres.

ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 235 (2002). Even among radicals, there was no unanimity on the land question; many proved reluctant to support a program that seemed to run so far afield of the sanctity of private property. *Id.* at 235–36.

²⁴ See Forbath, *supra* note 18, at 32–33.

²⁵ See *id.* at 26.

phrase, that property was "so essential for both individual and collective self-governance" that "every citizen should have some."²⁶

As the Labor Question eclipsed the Slavery Question in the politics of the rapidly industrializing postbellum North, it too had a constitutional cast. Invoking constitutional provisions aimed at protecting the rights of black ex-slaves in the South to support rights for white workers in the North was not farfetched. As Eric Foner has shown, defending white free labor always had loomed large in the Republicans' antislavery outlook,²⁷ and the party's leadership repeatedly declared that the Reconstruction Amendments embodied a promise of universal freedom, limited to "neither black nor white."²⁸

The Black Codes, passed by the Southern states in 1865–1866, reinstated a race-based caste system, keeping blacks as an inferior and dependent class by disabling them from owning, renting or transferring property, pursuing skilled callings, or seeking access to courts. The Civil Rights Act of 1866 was Congress's response. At a minimum, all Republicans meant to outlaw those disabilities, but most Republicans thought the new amendments went further. Beyond the unique harshness of this form of racial subjugation, the law could be used to hem resourceless white working people into a dependent and degraded caste-like condition. It could invest groups or classes of the propertied with "peculiar privileges and powers," and enshrine, in Thaddeus Stevens's words, "the recognized degradation of the poor, and the superior caste of the rich."²⁹ This, too, the new amendments should forbid. Republicans also celebrated the Thirteenth Amendment as a charter of free labor, aimed at securing the dignity and ending the degradation of labor, "both black and white,"³⁰ "subdu[ing] that spirit" which "makes the laborer the mere tool of the capitalist."³¹

²⁶ Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimum Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 37 (1990).

²⁷ See generally ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970).

²⁸ Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 446 (1989) (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 343 (1866)) (internal quotation marks omitted); see also HERMAN BELZ, *EMANCIPATION AND EQUAL RIGHTS* 108–40 (1978); 6 CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864–88*, pt. 1, at 1117–206 (1971).

²⁹ CONG. GLOBE, 39TH CONG., 1ST SESS. 3148 (1866) (statement of Rep. Stevens), quoted in FONER, *supra* note 23, at 254.

³⁰ William E. Forbath, *Why is This Rights Talk Different from All Other Rights Talk?: Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1796 (1994) (quoting VanderVelde, *supra* note 28, at 453) (internal quotation marks omitted).

³¹ *Id.* (quoting Ira Steward, *Poverty*, 9 AM. FEDERATIONIST 159, 160 (1902)).

C. The Gilded Age and Progressive Era: The Distributive Tradition and the New Corporate Economy

As Reconstruction ended and the Gilded Age began, the nation broke the Reconstruction Amendments' promise of racial justice. But the Distributive Constitution and the Free Labor Constitution remained active in public discourse, continually renewed and reinterpreted in the context of late nineteenth- and early twentieth-century social and economic transformations. Growing concentrations of wealth and power in the new giant corporations, widening class inequalities, mass immigration and poverty, and low wages spurred generations of reformers to declare that the United States needed a "new economic constitutional order" to secure the old promises of individual freedom, opportunity, and well-being.

Amid the turn-of-the-century battles over economic life, Progressivism was born. The heart of Progressivism lay in the contest between wealth and commonwealth. This struggle prompted the great popular interpreters of the Progressive Constitution to proclaim that in industrialized America "social justice" was indispensable for "legal justice."³² Figures like Teddy Roosevelt, Louis Brandeis, Jane Addams, and Herbert Croly insisted that the United States could not remain a constitutional republic without social and economic reform.³³ Overwork, joblessness, material insecurity, tyrannical workplaces, and a lack of decent housing and education left the nation's working classes ill-equipped for democratic citizenship. America was becoming a corporate oligarchy; working people were wage slaves, ciphers, and servants.

1. Brandeis on the Distributive Constitution and Labor Rights

Take Louis Brandeis, for example. Let us look a bit more closely at what he had to say about labor relations and the distribution of social goods as constitutional issues. The key object of law and government, Brandeis held, in good republican fashion, was sustaining a politically and economically independent citizenry.³⁴ The Constitution must safeguard not only a framework of government, but also the project of fitting citizens for "their task" of self-rule.³⁵ No more than his grittier counterparts in the labor movement did

³² See Forbath, *supra* note 18, at 69.

³³ See, e.g., MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 331 (2009). See generally HERBERT CROLY, PROGRESSIVE DEMOCRACY (1914).

³⁴ Forbath, *supra* note 18, at 56.

³⁵ Louis D. Brandeis, True Americanism: Fourth of July Oration (1915), in LOUIS D. BRANDEIS, BUSINESS—A PROFESSION 366 (1933) [hereinafter Brandeis, True Americanism]; see also U.S. COMM'N ON INDUS. RELATIONS, FINAL REPORT AND TESTIMONY, S. DOC. NO. 64-415, at 7657-81 (1st Sess. 1915), as reprinted in THE SOCIAL AND ECONOMIC VIEWS OF MR. JUSTICE BRANDEIS 380-85 (Alfred Lief ed., 1930); LOUIS D. BRANDEIS, *How Far Have We Come on the Road to Industrial Democracy?—An Interview*, in THE CURSE OF BIGNESS:

Brandeis expect the courts to enact this constitutional vision, but in this era, that took nothing away from its constitutional moorings. Today, we remember the restraint the Progressives demanded of the judiciary.³⁶ We forget the affirmative obligations their vision laid on the other branches of government. They sought not the divorce of constitutional discourse from political economy, but the end of the judiciary's sway as our "authoritative" constitutional political economist.³⁷

With a more democratically governed constitutional political economy would come an end to the use of inherited, anti-labor common law rules and entitlements to define the substantive content of constitutional guarantees. Thus, in a widely published 1915 address at Boston's Faneuil Hall, Brandeis evoked the possibility of interpreting "those rights which our Constitution guarantees—the right to life, liberty and the pursuit of happiness" in terms of the social and economic conditions for their meaningful exercise in modern America. All Americans "must have a reasonable income" and regular employment; "they must have health and leisure," decent "working conditions," and "some system of social insurance." However, "[t]he essentials of American citizenship are not satisfied by supplying merely the material needs . . . of the worker."³⁸ There could be no more "political democracy" in contemporary America, Brandeis told the U.S. Industrial Commission that same year, without "industrial democracy," without workers "participating in the decisions" of their firms as to "how the business shall be run."³⁹ Only by bringing constitutional democracy into industry could the United States produce not only goods, but citizens.⁴⁰

MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 43, 43–47 (Osmond K. Fraenkel ed., 1935) [hereinafter *BRANDEIS, Industrial Democracy*].

³⁶ See Clyde Spillenger, *Reading the Judicial Canon: Alexander Bickel and the Book of Brandeis*, 79 J. AM. HIST. 125, 132–38 (1992).

³⁷ JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 283–312 (1924).

³⁸ Brandeis, *True Americanism*, *supra* note 35, at 367–68, 370.

³⁹ *BRANDEIS, Industrial Democracy*, *supra* note 35, at 73–74.

⁴⁰ Like Croley and Brandeis, virtually every Progressive Era industrial reformer and reform organization relied on the language of democratic constitutionalism. Whether they were championing collective bargaining between employers and trade unions, or other reform visions—government ownership, producers, cooperatives, labor copartnership—all employed some version of the argument that "arbitrary government" and "industrial feudalism," must be abolished, workers' citizenship acknowledged, and industry "constitutionalized." See, e.g., MILTON DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY, 1865–1965*, at 136–74 (1970); *THE ENCYCLOPEDIA OF SOCIAL REFORMS* 481–86 (New York & London, Funk & Wagnalls Co., William D.P. Bliss ed., 2d ed. 1898); WALTER E. WEYL, *THE NEW DEMOCRACY: AN ESSAY ON CERTAIN POLITICAL AND ECONOMIC TENDENCIES IN THE UNITED STATES* 164 (1912); *The Constructive Work Before the Industrial Relations Commission: A Symposium with Introduction by Paul U. Kellogg*, 30 SURVEY 571 (1913); Howell John Harris, *Industrial Democracy and Liberal Capitalism, 1890–1925*, in *INDUSTRIAL DEMOCRACY IN AMERICA: THE AMBIGUOUS PROMISE* 43, 51–55 (Nelson Lichtenstein & Howell John Harris eds., 1993).

2. *The Labor Movement's Constitution*

For its part, the Progressive Era labor movement concurred. Organized labor's hostility toward the courts was not chiefly a result of cases like *Lochner*, which struck down maximum-hours laws and other reform legislation.⁴¹ More than it resented that form of judicial supremacy, organized labor attacked the courts' everyday interventions against workers' efforts to organize and use their joint strength to enhance their bargaining power with employers. Late nineteenth-century workers' successes in organizing across barriers of skill, race, and ethnicity prompted a sustained counteroffensive by employers and employers' attorneys. From the 1890s onward, they turned increasingly to blacklists, labor spies, private police, and the state. The nation's courts outlawed unions' most effective and broad-based economic weapons. When unions turned to legislatures to repeal this body of judge-made law and curtail judicial decrees against peaceful strikes and boycotts, the Supreme Court responded by striking down such legislation as invasions of employers' constitutional rights of property and contract.⁴²

Thus, from the 1890s through the 1920s, courts continued to enjoin peaceful strikes and boycotts demanding union recognition. They enveloped the brute repression of unions in a hard legal shell.⁴³ Yet, from organized labor's perspective, what the courts condemned were the essential means to put workers on a par with corporate employers, gaining, via collective bargaining, a measure of real liberty of contract and a genuine voice in the industrial workplace.

Early twentieth-century trade unionists and progressive reformers like Brandeis, then, thought unions were about more than securing for workers decent livelihoods and a greater share of the economic pie. They wanted to bring constitutional democracy to the industrial workplace so as to curb the authoritarian rule of foreman, boss, and executive. In pre-industrial America, progressives like Herbert Croly explained, the (white) laboring classes possessed property, and thus enjoyed a measure of independence and authority in economic life, which underpinned their citizenly freedom and dignity. Now, the laboring classes were "wage slaves" subjected to the tyranny of the boss or

⁴¹ See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 559–61 (1923) (striking down the constitutionality of minimum wage laws for women and children based on *Lochner's* freedom of contract principle).

⁴² See *id.* at 549–50; see also *Lochner v. New York*, 198 U.S. 45, 57–60 (1905) (striking down labor regulations on the basis of the employers' freedom of contract).

⁴³ Forbidding "whomsoever" from doing "whatsoever"—quitting or threatening to quit, meeting, singing, assembling, or encouraging others to do so—in support of a boycott or strike, the labor injunction was enforced by summary proceedings. Equally important, the decrees prompted state and federal police intervention—where local authorities frequently sided with strikers; the decrees also legitimated the widespread use of deputized private troops. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 59–127, 193–98 (1991).

foreman; and only “industrial democracy”—a term in common usage from the Progressive Era through the New Deal—could restore that freedom.⁴⁴ Democracy at work could be found in the collective bargaining process itself, which presupposed the organization of a relevant group of workers into some sort of collective institution, with a capacity for internal debate and external negotiation. “Industrial democracy” promised to generate the most precious commodity of the workaday world: informed and willing consent.

Unions cast their attacks on “industrial autocracy” in boldly constitutional terms. The “right of labor to have a voice in the industrial world” was the fundamental question of the era’s ongoing industrial conflicts, editorialized the labor press. Echoing Brandeis, union papers proclaimed, “Political equality is not sufficient and unless the wage-earner possesses an industrial equality that places him upon a par with his employer there can never exist that freedom and liberty of action which is necessary to the maintenance of a republican form of government.”⁴⁵ Workers’ rights to associate, assemble, organize, and strike constituted First, Thirteenth, and Fourteenth Amendment and Guarantee Clause claims repeatedly spurned by the courts that labor brought again and again to Congress and state legislatures.⁴⁶

D. *The New Deal Constitution*

By the early 1930s, in the thick of the Great Depression, Congress embraced much of labor’s exiled constitutional interpretations. Congress held extensive hearings on the uses of public and private police violence against striking workers and union organizers, on blacklists and labor spies, and on the scope and impact of judicial decrees outlawing labor meetings, protests and collective action. Revealingly, Congress called these hearings “on civil rights,” as they investigated “violations of the rights of free speech and assembly and undue interference with the right of labor to organize and bargain collectively.”⁴⁷ Senators echoed labor’s constitutional outlook when they declared at hearings’ end: “If [courts] go on making human relations into property relations . . . the Thirteenth Amendment to the Constitution will be

⁴⁴ On a variety of reform programs that marched under the “industrial democracy” banner, see Harris, *supra* note 40 at 44–65.

⁴⁵ *Id.* at 46–47 (quoting John P. Frey, *Editorial*, 40 IRON MOLDERS’ J. 750, 750 (1904). The indispensability of “industrial democracy” for a “republican form of government” was not an argument limited to labor journalists; at Senate hearings on the National Labor Relations Act in 1934, counsel for the AFL defended the constitutionality of the Act on Guarantee Clause, not Commerce Clause, grounds. *To Create a National Labor Board: Hearing on S. 2926 Before the S. Comm. on Educ. & Labor*, 73d Cong. 109 (1934) [hereinafter *To Create a National Labor Board*].

⁴⁶ See James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941 (1997), on laborers’ invocation of constitutional freedoms, especially those of the Thirteenth Amendment.

⁴⁷ See Jerold S. Auerbach, *The La Follette Committee: Labor and Civil Liberties in the New Deal*, 53 J. AM. HIST. 435, 440 (1964) (footnote omitted).

evaded, circumvented and dead"; and the "effect [of the antistrike injunctions] has often been involuntary servitude on the part of those who must toil in order that they and their families may live."⁴⁸

1. *The Norris-LaGuardia and Wagner Acts: Constitutional Rights-Bearing Statutes*

Finally, in 1932 and 1935, with the Norris-LaGuardia and Wagner Acts, Congress outlawed the federal antistrike decree and inscribed into federal law the constitutional freedoms labor claimed: to organize, engage in concerted action, and bargain collectively.⁴⁹ The former's preamble sounded some of the key themes of labor's exiled constitution;⁵⁰ but it did no more than prevent judicial repression of labor's freedoms. Only with the Wagner Act was the employer's common law authority over workers and workplace torn away, and labor's freedoms safeguarded against private deprivations. The statute's cornerstones, set forth in its central section, were those rights organized labor had long claimed under the Guarantee Clause and the First, Thirteenth and Fourteenth Amendments: to associate, organize and act in concert, and to designate "representatives of their own choosing."⁵¹ Any interference with, any reprisals for, and any such actions on the employers' part became a federal offense. The Senate Report on the Wagner Act rang out the constitutional changes: "A worker in the field of industry, like a citizen in the field of government," had an "inherent [] right" to "self-government." In both fields, he or she "ought to be free to form or join organizations, to designate representatives, and to engage in concerted activities."⁵²

The very language of the statute incorporated the legal realist insight that *private* employers' denials of these rights were, in fact, only possible by virtue of the *publicly* fashioned and state-enforced background rules of property, contract and corporations. Hence, it behooved government to revise these rules in the service of workers' constitutionally grounded associational and economic liberties, as Congress now understood them. Much like the civil rights statutes of the 1960s, the Wagner Act was understood as bringing constitutional norms to bear in the field of private employment. The Wagner Act safeguards against firing and reprisals for talking to the union, or joining the union or going on strike to demand collective bargaining. These were seen as *constitutional*

⁴⁸ FORBATH, *supra* note 43, at 161 (quoting Andrew Furuseth, leader of the Seaman's Union, in his statements to the Senate Subcommittee on the Judiciary Committee).

⁴⁹ See *id.* at 128–66.

⁵⁰ Norris-LaGuardia Act, ch. 90, § 2, 47 Stat. 70, 70 (1932) (codified at 29 U.S.C. § 102 (2006)).

⁵¹ National Labor Relations (Wagner) Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 157 (2006)).

⁵² Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 503 (1993) (quoting in part S. REP. NO. 73-1184, at 4 (1934)).

safeguards of basic freedoms, even though they ran against employers and not the state.⁵³

The Act swept aside whole swaths of law and upended whole constellations of social power; it was as transformative as any Congress had ever enacted or would ever enact. Small wonder that—like the civil rights rulings of a progressive Court a generation later—it was met by massive defiance. “Organizers and activists continued to be fired, beaten, and blacklisted.”⁵⁴ Where new unions had sprung up, employers continued to refuse recognition. Employers defended their defiance of the Act in the name of the old Constitution of contract, property, and states’ rights, and employers’ defiance was seconded by the lower federal courts.⁵⁵ The latter uniformly voided the statute and enjoined enforcement actions by the new National Labor Relations Board.⁵⁶ Would workers’ newly enacted rights prevail over the old Constitution in the Supreme Court? Pundits predicted not, but of course, events proved them wrong. Argued amid turbulent sit-down strikes and front-page newspaper photos of occupied auto plants festooned with banners that read: “Supreme Court: We demand our rights,” and handed down in the wake of President Franklin D. Roosevelt’s controversial Court-packing plan, *NLRB v. Jones & Laughlin Steel Co.* in 1937 upheld labor’s new rights⁵⁷ and, like the New Deal Congress, it deemed them “fundamental.”

2. *The Distributive Constitution’s New Deal*

I will return to these rights of self-organization, concerted action and collective bargaining to consider the ruined state we find them in today. But first, we must resume the story of the broader Distributive Constitution, its partial fruition in the New Deal and its present eclipse. Intervening between the enactment of the Wagner Act and the Court’s decision upholding it was the landslide election of 1936. Roosevelt characterized the 1936 campaign as a moment of extraordinary popular deliberation and a time for basic constitutive choices about the powers and duties of government and citizens’ legitimate claims against the state.⁵⁸ In speeches and radio addresses, Roosevelt set himself a task of constitutional narration and interpretation to win the nation’s

⁵³ William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 195–201 (2001).

⁵⁴ *Id.* at 198.

⁵⁵ *Id.*

⁵⁶ See RICHARD CORTNER, *THE WAGNER ACT CASES* 98–99 (1964); PETER H. IRONS, *THE NEW DEAL LAWYERS* 244–48 (1982); Drew D. Hansen, *The Sit-Down Strikes and the Switch in Time*, 46 WAYNE L. REV. 49, 104–05, 128 (2000).

⁵⁷ 81 CONG. REC. 2940 (1937) (statement of Sen. Wagner); *Judgment Day*, *supra* note 5, at 7.

⁵⁸ President Franklin D. Roosevelt, *We Have Only Just Begun to Fight* (Oct. 31, 1936), in 5 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE PEOPLE APPROVE* 566, 568–73 (Samuel I. Rosenman ed., 1938).

support for what he termed a “re-definition of [] rights in terms of a changing and growing social order.”⁵⁹

Looking back in early 1937, Roosevelt and New Dealers in Congress depicted their crushing victory as a “great . . . revolution.”⁶⁰ The “dominant five-judge economic and social philosophy . . . was repudiated by the people of America”⁶¹ “The people have overwhelmingly approved this [New Deal] legislation” like the Wagner Act that the “Federal courts [had] struck down.”⁶² In these terms, New Deal Senator and soon-to-be-Justice Hugo Black put the case for the Administration’s controversial Court-packing plan. It was “not only the right of Congress under the Constitution, but the imperative duty of Congress, to protect the people” from the “miserable and degrading effects” of joblessness, exploitation and poverty.⁶³ “A necessitous man is not a free man,” Roosevelt proclaimed. “Every man has a right to life” and a “right to make a comfortable living.” The “[g]overnment formal and informal, political and economic, owes to everyone an avenue to possess himself of a portion of [the nation’s wealth] sufficient for his needs, through his own work.”⁶⁴ What was more, “[e]conomic or social insecurity due to old age. . . . infirmity, illness, or injury . . . [or] unemployment” were injuries to liberty itself, and so government also must enable “all Americans” jointly and severally to insure themselves against those injuries.⁶⁵ Thus, alongside education, “training and retraining,” decent work, and decent pay, Roosevelt’s Second Bill of Rights set out rights to social insurance, including health care.⁶⁶

The terms of our basic rights, Roosevelt explained, “are as old as the Republic,” but new conditions demand new readings.⁶⁷ The old constitutional economic guarantees, like equality in the enjoyment of the “old and sacred possessive [common-law] rights” of property and contract had rich significance for the “welfare and happiness” of ordinary Americans in the preindustrial

⁵⁹ Franklin D. Roosevelt, *New Conditions Impose New Requirement upon Government and Those Who Conduct Government* (Sept. 23, 1932), in 1 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE GENESIS OF THE NEW DEAL* 742, 753 (Samuel I. Rosenman ed., 1938) [hereinafter *Roosevelt, Address on Progressive Government*].

⁶⁰ 81 CONG. REC. 1265, 1291 (1937) (statement of Sen. McKellar).

⁶¹ *Id.* at 306, 307 (reprinting radio address by Hon. Hugo L. Black).

⁶² *Id.* at 1265, 1291 (statement of Sen. McKellar).

⁶³ *Id.* app. at 636, 639 (address by Hon. Hugo L. Black).

⁶⁴ See Roosevelt, *Address on Progressive Government*, *supra* note 59, at 754.

⁶⁵ 80 CONG. REC. 9223 (1936) (statement of Sen. Ashurst).

⁶⁶ See President Franklin D. Roosevelt, *State of the Union Address* (Jan. 11, 1944), in 13 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: VICTORY AND THE THRESHOLD OF PEACE* 32, 41–42 (Samuel I. Rosenman ed., 1950) (outlining eight economic rights “under which a new basis of security and prosperity can be established for all”); see also MARION CLAWSON, *NEW DEAL PLANNING: THE NATIONAL RESOURCES PLANNING BOARD* 136–40 (1981) (describing U.S. NAT’L RESOURCES PLANNING BD., SECURITY, WORK, AND RELIEF POLICIES (1942), an NRPB report that recommended expanded government support for health, education, and welfare).

⁶⁷ See Roosevelt, *Address on Progressive Government*, *supra* note 59, at 754.

United States.⁶⁸ Now, only recognition of new governmental responsibilities would enable “a return to values lost in the course of . . . economic development” and “[a] recovery” of the old rights’ once robust social meaning.⁶⁹ In other words, the very reasons that courts had constitutionally enshrined the old common law economic rights, now compelled enshrining the new social rights. Here we mark Roosevelt’s increasingly pointed use of the Progressive reformers’ constitutional hermeneutics—the argument of changing conditions imperiling old distributive principles, and new interpretations and institutional arrangements restoring them. Likewise, in speaking of “[g]overnment formal and informal, political and economic,” Roosevelt and his speechwriters had embraced the progressive traditions and Legal Realists’ insight into the public, legally constructed character of private economic power.⁷⁰ This opened the space where equal citizenship norms could compel changes in the private law rules governing market and property relations.

3. *Jim Crow and the Harsh Limits of New Deal Reform*

But the New Deal was an incomplete triumph. The main legislative embodiments of Roosevelt’s “Second Bill of Rights”—the Wagner, Fair Labor Standards, and Social Security Acts of the 1930s—were great achievements, but all of them had been crafted to exclude African-Americans. Mass disenfranchisement in the South (not only blacks but the majority of poor and working-class white southerners lost the vote by dint of devices like the poll tax) meant that an astonishingly small proportion of the region’s adult population was entitled to vote. A planter and new industrialist oligarchy chose the bulk of the South’s congressional delegation, and the latter, in turn, demanded that key New Deal bills exclude the main categories of southern labor.⁷¹ More encompassing and inclusive bills enjoyed solid support from northern Democrats (and broad but bootless support from disenfranchised southern blacks and poor whites), but the southern Junkers exacted their price.⁷² By the late

⁶⁸ President Franklin D. Roosevelt, Message to the Congress Reviewing the Broad Objectives and Accomplishments of the Administration (June 8, 1934), in 3 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE ADVANCE OF RECOVERY AND REFORM 287, 292 (Samuel I. Rosenman ed., 1938).

⁶⁹ *Id.*

⁷⁰ See Roosevelt, Address on Progressive Government, *supra* note 59, at 754.

⁷¹ See William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1835–36 (2001).

⁷² See JAMES T. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS, 1933–1939, at 40–76 (1967); 1 HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE 104 (1978); NANCY J. WEISS, FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR 34–59 (1983); Kenneth Finegold, *Agriculture and the Politics of U.S. Social Provision: Social Insurance and Food Stamps*, in THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 199, 199–234 (Margaret Weir et al. eds., 1988); Ira

1930s, Southern Democrats openly joined ranks with conservative members of the minority Republicans. This conservative coalition thwarted Roosevelt's and congressional New Dealers' efforts to enact national health insurance, to remedy the many gaps and exclusions in the Social Security Act, and to create a federal commitment to full employment.⁷³

Thus, the constitutional bad faith—on the part of both parties, and in fact most of white America—that had led all three branches of the federal government to abandon Reconstruction and condone Jim Crow and black (and poor white) disenfranchisement in the South did more than deprive black Americans of civil and political rights for almost another century. This same constitutional bad faith prevented all Americans from securing the full boon of Roosevelt's Second Bill.⁷⁴

These aspirations did not vanish, however. Instead, they flowed into private channels. By the 1940s, the new industrial unions had emerged as the only powerful, organized constituency for social and economic rights. Blocked at every legislative crossroads, the unions during the 1940s–1960s fashioned a robust *private* welfare state by bargaining for private entitlements to job security, pensions, and health insurance for their members. “Beyond the unionized sectors of the economy, industrial prosperity, liberal tax incentives,

Katznelson et al., *Limiting Liberalism: The Southern Veto in Congress, 1933–1950*, 108 POL. SCI. Q. 283, 283–302 (1993).

⁷³ See STEPHEN KEMP BAILEY, CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946, at 165–67 (1950) (providing the most detailed legislative history of the Administration's Full Employment Bill. Bailey chronicles the efforts of Truman and his cabinet to pressure Congress into passing the Administration's 1945 Bill. He makes clear that the key players in gutting the Bill were all Southern Democrats); RICHARD FRANKLIN BENSEL, SECTIONALISM AND AMERICAN POLITICAL DEVELOPMENT 1880–1980, at 152–68 (1984); CLAWSON, *supra* note 66, at 283–332; Katznelson et al., *supra* note 72, at 283–302. See generally BARRY DEAN KARL, EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL: THE GENESIS OF ADMINISTRATIVE MANAGEMENT, 1900–1939 (1963); THE NEW DEAL AND THE SOUTH (James C. Cobb & Michael V. Namorato eds., 1984).

⁷⁴ More than that, it produced a system of social provision that would remain split along racial and class lines. “Social Security” originally embraced all three programs that fell within the scope of the 1935 Act. In other words, the aid program for dependent children (later AFDC) which, until last month, we knew and reviled as “welfare,” was part of “social security.” By the same token, Roosevelt's “general welfare Constitution” and “general welfare state” embraced all the New Deal social insurance programs, including contributory old-age insurance. Today, no politician would associate “social security” with the “welfare state.” Of course, Roosevelt and the CES did distinguish between “social insurance” and “public assistance,” but they also believed that within a generation, contributory old-age insurance and unemployment insurance combined with employment assurance would cover almost everyone and leave only a handful of people dependent on “public assistance.” This comfortable illusion was premised on the exclusion of most of black America from the nascent “general welfare state.” The illusion crumbled as soon as blacks won political rights, and black poverty and unemployment gained urban visibility. See generally Forbath, *supra* note 53.

and the hope of thwarting unionization prompted large firms to adopt the main features of this generous publicly subsidized, private welfare system.”⁷⁵

So social rights talk fell into disuse after the 1940s. New Dealers on the bench upheld a vast expansion of national governmental power, but they did not translate into doctrine the distributive vision that it was expanded for. Because the energies and aspirations animating that vision had turned to the private sector, neither on the Court nor in political discourse did the New Deal vocabulary of citizens’ social rights and government’s distributive duties find renewed expression. Meanwhile, much of the work of post-World War II liberal and progressive constitutional law and politics focused on overturning the racial and gendered exclusions that marred the private welfare state and labor market and the segmented and caste-ridden system of public social insurance bequeathed by the New Deal.⁷⁶

E. The 1960s: Civil Rights and Welfare Rights

In the context of civil rights struggles, social rights talk briefly revived with a new content and constituency. African-Americans found themselves excluded from the post-war prosperity that the New Deal settlement distributed broadly across white America. Their anger exploded in many of the large cities of the North, where millions of Southern blacks had moved over the preceding decades to escape Jim Crow and rural unemployment.⁷⁷ For them, public assistance stood as the sole federal protection against poverty. Public assistance meant federal Aid to Families with Dependent Children (AFDC), and it was this separate, decentralized, and deeply gendered and racialized benefits program,⁷⁸ stamped with many of the centuries-old degradations of poor relief,⁷⁹ that the short-lived welfare rights movement sought to transform into a dignifying national right to a guaranteed income.

Many African-American leaders tried to craft a broader social rights agenda—invoking Roosevelt’s Second Bill and its rights to decent work and

⁷⁵ William E. Forbath, *Social and Economic Rights: A Brief Guide to the Constitution of Work and Livelihoods*, 11 WORKING USA 145, 151 (2008).

⁷⁶ GOLUBOFF, *supra* note 2, considers the shift from a constitutional strategy based on social and labor rights to one of battling segregation from the perspective of the Civil Rights Section of the Justice Department and the NAACP.

⁷⁷ FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE 215, 222–46, 250 (1971); *see also* MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 106 (1989); NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA 16, 70 (1991).

⁷⁸ *See* WINIFRED BELL, AID TO DEPENDENT CHILDREN 33–34, 63–65, 76–79, 81–82, 108–09 (1965).

⁷⁹ *See id.* at 16, 63–65, 82, 107, 139; MICHAEL B. KATZ, IMPROVING POOR PEOPLE: THE WELFARE STATE, THE “UNDERCLASS,” AND URBAN SCHOOLS AS HISTORY 28 (1995).

livelihoods⁸⁰—but the mass constituencies and organizations for such an agenda were not there. What Congress and the Lyndon Johnson Administration's War on Poverty supplied were community action programs, thousands of attorneys, social workers and community resident-activists, often veterans of civil rights activism.⁸¹ They set about getting poor people to apply for welfare and attacking the social and legal barriers to their getting it.⁸²

Never before had poor African-American women formed the rank and file of a nationally organized social movement.⁸³ Like earlier movements for social and economic justice, they claimed decent income as a right; unlike the earlier movements, they did not tie this right to waged work. Most strands of distributive constitutional and social-citizenship thought constructed their programs and ideals in a gendered fashion, around the working man-citizen; a decent income and social provision were rights of (presumptively white male) waged workers and their dependents. By the 1960s, poor black women had enough experience in urban labor markets to know that decent jobs were hard to find and enough experience with workfare to think it coercive and demeaning.⁸⁴ A guaranteed adequate income also was a way to fulfill what, in the 1960s, remained a dominant norm: full-time mothering at home. The National Welfare Rights Organization (NWRO) demanded it as an unconditional right, essential to equal respect and an appropriate touchstone of equality in an affluent America.⁸⁵

The links and continuities with the civil rights struggle were not lost on the federal courts, as they decided cases undoing the exclusion of black women from welfare rolls. Hundreds of cases brought by Legal Services attorneys

⁸⁰ See, e.g., MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 193, 199–200 (1967); Bayard Rustin, Address to Democratic National Convention, Atlantic City, N.J. (Aug. 1964), in Bayard Rustin Papers, reel 3, at 27 (Univ. Pub. of America, Inc. 1988).

⁸¹ See KATZ, *supra* note 77, at 95, 97–101; LEMANN, *supra* note 77, at 133; PIVEN & CLOWARD, *supra* note 77, at 266. See generally JOSEPH H. HELFGOT, PROFESSIONAL REFORMING: MOBILIZATION FOR YOUTH AND THE FAILURE OF SOCIAL SCIENCE (1981); IRA KATZNELSON, CITY TRENCHES: URBAN POLITICS AND THE PATTERNING OF CLASS IN THE UNITED STATES (1981).

⁸² PIVEN & CLOWARD, *supra* note 77, at 290–305; see also JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 95 (1982).

⁸³ For examples of poor women's leadership roles in welfare rights activism, see PIVEN & CLOWARD, *supra* note 77, at 324–25. See also KATZ, *supra* note 79, at 84–85; Felicia Kornbluh, *To Fulfill Their "Rightly Needs" Consumerism and the National Welfare Rights Movement*, 69 RADICAL HIST. REV. 76, 97 (1997). See generally LARRY R. JACKSON & WILLIAM A. JOHNSON, PROTEST BY THE POOR: THE WELFARE RIGHTS MOVEMENT IN NEW YORK CITY (1974); JACQUELINE POPE, BITING THE HAND THAT FEEDS THEM: ORGANIZING WOMEN ON WELFARE AT THE GRASS ROOTS LEVEL (1986).

⁸⁴ Kornbluh, *supra* note 83, at 97. See generally NICK KOTZ & MARY LYNN KOTZ, A PASSION FOR EQUALITY: GEORGE A. WILEY AND THE MOVEMENT 227 (1977).

⁸⁵ See Felicia Kornbluh, *The Goals of the National Welfare Rights Movement: Why We Need Them Thirty Years Later*, 24 FEMINIST STUD. 65, 67 (1998).

dramatically broadened eligibility standards;⁸⁶ federal judges went a long way toward transforming a grant-in-aid to the states to be administered as meanly as local officialdom saw fit, into a no-strings and no-stigmas national right to welfare.⁸⁷ The whole push of these developments was reflected in the Supreme Court's repeated insistence that public assistance for impoverished citizens was a basic commitment—not charity or largesse, but a right. The Court evoked the social and constitutional outlook of Roosevelt and the New Deal: "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty."⁸⁸ And like Roosevelt, the Court rang out the changes on the Preamble to the Constitution, only now on behalf of those conspicuously excluded from New Deal social citizenship: "Welfare . . . can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community." Public assistance, then, is a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."⁸⁹

Gaining welfare as a matter of right promised to relieve unjustifiable suffering and indignities. It was a social rights claim that highlighted the coercive and gendered aspects of older employment-based models of economic justice. But it would not do enough to help poor African-Americans make their way into a shared social destiny of work and opportunity. In any case, welfare rights were in trouble. Not only the racialized cast of welfare and the changing cast of the Supreme Court, but also the massive entry of white working and middle-class women into the full-time paid labor force left AFDC vulnerable and exposed.⁹⁰ Assailed for years, in 1996, a Republican Congress and a

⁸⁶ KATZ, *supra* note 82, at 65–66, 78, 86, 90; PIVEN & CLOWARD, *supra* note 77, at 315. See generally MARTHA F. DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973* (1993); MARTIN GARBUS, *READY FOR THE DEFENSE* (1971); SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* (1990); Edward V. Sparer, *The Right to Welfare*, in *THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE* 65 (Norman Dorsen ed., 1971); Edward V. Sparer, *The Role of the Welfare Client's Lawyer*, 12 UCLA L. Rev. 361 (1965).

⁸⁷ See R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 88–89 (1994). See generally LAWRENCE, *supra* note 86. For cases, see, for example, *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968); *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977); *Maryland v. Mathews*, 415 F. Supp. 1206 (D.D.C. 1976); *J.A. v. Riti*, 377 F. Supp. 1046 (D.N.J. 1974); *Owens v. Roberts*, 377 F. Supp. 45 (M.D. Fla. 1974); *Cooper v. Laupheimer*, 316 F. Supp. 264 (E.D. Pa. 1970).

⁸⁸ *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970).

⁸⁹ *Id.* at 265.

⁹⁰ On the growing workforce participation of white women, see Howard N. Fullerton, Jr., *Labor Force Participation: 75 Years of Change, 1950–98 and 1998–2025*, MONTHLY LAB. REV., Dec. 1999, at 3, 3–6, available at <http://www.bls.gov/mlr/1999/12/art1full.pdf>.

Democratic president (Bill Clinton) repealed poor Americans' federal right to welfare assistance, ending "welfare as we [knew] it."⁹¹

The welfare rights campaign had been an extension of the civil rights movement; it was of a piece with the constitutional project of overcoming the racialized and gendered exclusions that marred the New Deal settlement. And apart from this campaign, during the prosperous post-war era, progressives largely forgot the distributive tradition and its core idea that the Constitution speaks to harsh class inequalities and the deprivation and domination they breed.

III. THE DISTRIBUTIVE CONSTITUTION AND TODAY'S INEQUALITIES

Today, the New Deal social and economic order is crumbling. The nation's once ample supply of stable, secure, decently paid unskilled or semi-skilled jobs has dried up, and the generous private welfare state has been dismantled. In the thick of a Great Recession, we see the results of a decades-long crusade against corporate and governmental responsibility for individual welfare, which swept like a grim reaper through pension plans, health insurance, and labor standards, cutting the bonds of social solidarity, and shifting the burdens of and responsibilities for economic risk from government and corporations to workers and their families.

A. Reimagining the Distributive Constitution in the Twenty-First Century

Now, the right is elevating this decades-long attack on progressive social policy into a matter of constitutional principle. In recent months, the Tea Party and its allies in Congress and the courts have brought the old laissez-faire constitutional case against public social provision from the right-wing blogosphere and the work of the libertarian legal intelligentsia into legislative debate and the opinions of federal judges. Texas Governor Rick Perry, a Republican contender for the White House, proclaims that Social Security, Medicaid and Medicare are unconstitutional.⁹² As was often the case over the past century, the right has been first to highlight what it takes to be the constitutional stakes in our conflicts over social and economic policy. It is time for progressives to respond by revisiting the Distributive Constitution and exploring how its precepts apply to our unjust and troubled society today. By our lights, the nation's mounting, democracy-destroying inequalities threaten

⁹¹ For Clinton's campaign trail promise to end welfare, see his speech at Georgetown University. Governor Bill Clinton, *The New Covenant: Responsibility and Rebuilding the American Community* Address at Georgetown University (Oct. 23, 1991), *available at* http://www.dlc.org/ndol_ci.cfm?contentid=2783&kaid=128&subid=174. The law that repealed a right to welfare assistance is the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 424.

⁹² See generally RICK PERRY, *FED UP! OUR FIGHT TO SAVE AMERICA FROM WASHINGTON* (2010).

constitutional injury. Gross economic inequalities and the public policies that promote them are producing an oligarchy of wealth. They also are depriving tens of millions of Americans of access to basic goods. These Americans lack more than money; they are at constant risk of social and spiritual debilitation. They are deprived of a fair chance of sharing with other Americans a common destiny of work and opportunity, and a fair chance of participating in civic life on a plane of rough equality. And still, our national constitutional conversation lacks a strong defense of the progressive tradition and the right's constitutional take on basic distributional choices lacks a counter from the left.

The precepts of the Distributive Constitution call on government to craft law and policy so that *all* Americans can enjoy a real measure of equal opportunity and equal citizenship: a decent education and livelihood, a voice and some genuine freedom and dignity at work, provision for when they can't work, a chance to do something that has value in their own eyes, and a chance to engage in the affairs of their communities and the larger society. As we've seen, these are not new precepts. With the exception of social insurance, they go back to the early republic. Beginning in the late nineteenth and early twentieth century, progressives applied them to the changed political and economic conditions of industrial America. What is newer in the progressive outlook, less than half a century old, is the idea that everyone—not only white men—is entitled to this generous conception of liberty and equality. Today's challenge is to reimagine this generous conception's application once more, to include everyone in a post-industrial, globalizing political economy of citizenship.

Alongside a progressive counter-narrative, in other words, we need to reinvent progressive constitutional political economy. Like the right's constitutional political economy, ours must offer hard-nosed analyses of the group interests and constellations of power that shape law, and of the role of law and possible law reforms in shaping or reshaping the power and interests of those groups in relation to one another. And like the right's, ours must combine such analysis with a focus on our understanding of the nation's constitutional commitments, and how they are promoted or imperiled and defeated in this law-shaped field of power and interests.

Elsewhere, I have sketched some new contours of key social rights and key forms of social provisions to meet twenty-first century problems and challenges.⁹³ Here in Ohio, where labor rights are in contention, I will focus my brief observations on them.

⁹³ See generally William E. Forbath, *Social and Economic Rights in the American Grain: Reclaiming Constitutional Political Economy*, in *THE CONSTITUTION IN 2020*, at 55 (Jack M. Balkin & Reva B. Siegel eds., 2009).

B. *The Erosion of Labor Rights and Its Broad Political and Distributional Consequences*

Globalization and heightened international competition can bear only so much of the explanatory weight for the past three decades of mounting inequality and the cutting of social bonds; other advanced capitalist nations have remained competitive without suffering this fate. But these other nations possess a mid-twentieth-century institution that the United States has lost: robust private sector unionism. In the United States, by contrast, the past three decades saw the deep erosion of private sector unionism. Since the 1970s in the United States, union density plummeted from roughly 40% to less than 10% of the private workforce.⁹⁴ The two developments were entwined. The dwindling of unions did more than deprive workers of voice and clout in the workplace. It also weakened the clout of working people in Congress and state legislatures. From the New Deal onward, unions have done the heavy lifting when it comes to electing (and keeping pressure on) state and national lawmakers who have supported progressive tax policies, more generous unemployment benefits, Medicaid and Medicare, civil rights statutes and the broad distribution of the risks and rewards of economic life.⁹⁵ More than any other factor, it may be the erosion of organized labor over the past few decades that explains Congress's failures to counteract—as well as Congress's positive contributions to—the growing inequalities and inequities of the past few decades.⁹⁶ If the progressive

⁹⁴ News Release, U.S. Dep't of Labor, Bureau of Labor Statistics, Union Members—2010 tbl.3 (Jan. 21, 2011), <http://www.bls.gov/news.release/pdf/union2.pdf>.

⁹⁵ Indeed, since the New Deal, organized labor's great legislative successes all have been pushing through Congress laws that have benefited working people across the board, union and non-union alike; that is surely a good thing. Organized labor has failed utterly for more than half a century to overcome the intense and unified opposition of employers, large and small, in efforts to gain even modest pro-union reforms in the laws governing industrial relations. And that, we will see, has grown to be a calamity.

⁹⁶ On labor's past support for progressive legislation, and the serious consequences for workers in and out of unions of labor's weakening political clout, see David S. Broder, *The Price of Labor's Decline*, WASH. POST, Sept. 9, 2004, at A27, available at <http://www.washingtonpost.com/wp-dyn/articles/A6959-2004Sep8.html>. For a broad history linking the precipitous drop in union political power after 1978 with the rise of conservative big business influence in Washington, see generally KIM MCQUAID, *UNEASY PARTNERS: BIG BUSINESS IN AMERICAN POLITICS, 1945–1990* (1994). Professor Larry Bartels lists the waning of union political influence since the late 1970s as an important factor tilting government policy in favor of the rich and away from working-class wage earners in LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 217–51 (2008). Bartels' book builds on an earlier study of U.S. Senators in a period of waning labor political influence—the late 1980s and early 1990s—that found Senators, even Democratic ones, unresponsive to the policy desires of constituents in the lower one-third of the income scale. See generally Larry M. Bartels, *Economic Inequality and Political Representation* (Aug. 2005) (unpublished manuscript), available at <https://www.princeton.edu/~bartels/economic.pdf>. For an argument that increasing income inequality will only exacerbate existing disparities in political voice, see generally Task

tradition is right, and constitutional democracy depends on a measure of social democracy, then we deal here with a constitutional crisis in slow motion: a crisis that the attack on public sector unions—if it is not stopped—is sure to worsen.

C. Comparing Union Density and Protection of Labor Rights in the Public and Private Sectors: The Democratic Deficit in the American Workplace

1. Public Versus Private Sector Union Density and the Current Attacks on Public Sector Collective Bargaining Rights

While private sector union density has plummeted, public sector unionism has grown—to roughly 40% of the public workforce.⁹⁷ This has not offset the sharp diminution of organized labor's political heft brought by the decline of private sector unionism, but it has mitigated it. As Michael Fischl, James Brudney and other labor law scholars recently have shown, when you parse today's anti-public-sector-collective-bargaining laws, it becomes clear these laws are designed to enfeeble public sector unionism not for the asserted rationale of relieving the budget crises, but for the purpose of depriving progressive lawmakers and progressive legislation of powerful support.⁹⁸ In the years ahead, a United States with enfeebled unions in *both* the public and private sectors would mean politics without any powerful associations that aggregate and fight for the economic interests of working Americans in state and national polities.⁹⁹ Since women and people of color bulk large in public

Force on Inequality & Am. Democracy, Am. Political Sci. Ass'n, *American Democracy in an Age of Rising Inequality*, 2 PERSP. ON POL. 651 (2004).

⁹⁷ News Release, *supra* note 94. Indeed, the number of public sector union workers in the United States now exceeds the number in the private sector, notwithstanding that public sector workers comprise less than 17% of the U.S. workforce. See Richard Michael Fischl, "Running the Government Like a Business": Wisconsin and the Assault on Workplace Democracy, 121 YALE L.J. ONLINE 39, 44 (2011), <http://yalelawjournal.org/2011/06/21/fischl.html>.

⁹⁸ Among other things, most of the laws exempt some powerful public sector unions—police and firefighters—from the stripping away of collective bargaining rights. And these turn out to be the unions that support conservative politicians. Meanwhile, the affected unions have proved consistently willing to make major concessions on the pay and pensions issues at the heart of the crisis, even as they have resisted the dismantling of collective bargaining, which makes the difference between authoritarian and more or less democratic governance at the workplace. See Fischl, *supra* note 97, at 56–63; see also James J. Brudney, *Ohio Senate Bill 5, and Why We Need Collective Bargaining*, AM. CONST. SOC'Y BLOG (Apr. 13, 2011), <http://www.acslaw.org/acsblog/ohio-senate-bill-5-and-why-we-need-collective-bargaining>.

⁹⁹ Jacob Hacker and Paul Pierson argue that policymakers respond to institutions and associations, rather than to the preferences of voters, thus producing policy skewed towards wealthier Americans, whose interests are well represented by associations in Washington,

sector jobs and unions, this also would mean a particular loss of clout for workers at the bottom.¹⁰⁰

2. *Explaining the Difference: The Role of a Ruined Regime of Labor Rights in the Private Sector*

But what explains the striking contrast between the declining portion of private sector unionism and the strong and still growing presence of public sector unions? There are many rival and overlapping explanations. But the most persuasive ones suggest that the legal landscape has played a critical role. Different bodies of law govern in the two sectors. A key difference is that in the public sector, you don't put your job and pay check on the line by "talking union" or getting involved in union activity. In the private sector, where the NLRA governs, the odds are good that you'll be fired, and neither the law nor the union will be able to do much about it. The NLRA has become a toothless lion, which no longer provides any meaningful protection for the rights it enshrined. Beginning in the 1980s, as corporations began cutting back and dismantling the post-war private welfare state, they also mounted a new season of union-busting and aggressive efforts to thwart organizing and defeat union elections. These anti-union campaigns are rife with textbook violations of the NLRA. Firing union activists is flatly illegal, but it carries no significant penalties. If Labor Board sanctions finally arrive, they are treated as a paltry cost of doing business—and a small price to pay for defeating the union.

Examining the differences between the law governing public and private sector unionism provides a new perspective on how and why law has mattered in the travails of organized labor.¹⁰¹ It seems to confirm what a number of students of private sector labor law argued for decades. By abandoning the freedoms enshrined in the National Labor Relations Act (NLRA) and failing to protect the civil liberties of Americans at work, the courts and Congress have done more than create a "constitutional black hole" in our labor law. They also have created a "democratic deficit," a substantial gap between the numbers of

while the strength of organizations representing the poor and working class wanes. *See generally* JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010).

¹⁰⁰ Women and minorities are overrepresented in public sector employment in part because they have fled wage discrimination in the private sector. *See generally* Jared J. Llorens, Jeffery B. Wenger & J. Edward Kellough, *Choosing Public Sector Employment: The Impact of Wages on the Representation of Women and Minorities in State Bureaucracies*, 18 J. PUB. ADMIN. RES. & THEORY 397 (2008).

¹⁰¹ For a recent detailed treatment of this comparison, on which this Article relies, see Fischl, *supra* note 97, at 44–56. This line of argument has its roots in Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

Americans who want a collective voice and union representation at work and the numbers who enjoy those rights.¹⁰²

Private sector unions are governed, by and large, by the NLRA. Public sector unions are governed, instead, by state statutes, which come in a variety of shades. Roughly speaking, some dozen states outlaw public sector unions and collective bargaining, as Wisconsin, Ohio and other states are now in the process of doing.¹⁰³ Most states, however, allow public employee unions and collective bargaining, but forbid strikes. In place of strikes, about five states provide for binding arbitration as a quid pro quo for denying the right to strike.¹⁰⁴ Others do not. While still others, about a half-dozen, allow strikes, except on the part of police and other “essential” public servants.¹⁰⁵ How much bargaining power a public employee union enjoys hinges partly on which of these three kinds of collective bargaining laws prevails. But all of them provide a measure of democracy at work, of internal debate and deliberation among workers, and consultation, negotiation, and engagement on the part of bosses.

When governors and state legislators set about eliminating these rights entirely for a significant swath of public employees, they are stripping away constitutional essentials. For when they champion this in the name of “running government like a business,”¹⁰⁶ they are not proposing to replace old-model collective bargaining with more up-to-date models of worker voice and

¹⁰² Fischl, *supra* note 97, at 40, 42.

¹⁰³ Thirteen states do not provide for bargaining by public employees. They are: Alabama, Arizona, Arkansas, Indiana, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Texas, Virginia, West Virginia, and Wisconsin. In Indiana, the withdrawal of the executive order establishing collective bargaining by Governor Mitch Daniels in 2005 left only teachers with collective bargaining rights. Senate Bill 575, signed this year, restricts teachers’ bargaining rights. As noted, the Wisconsin law exempts police and firefighter unions. Texas prohibits collective bargaining for most public employees; police and firefighters may bargain in large urban jurisdictions with approval from a majority of voters. Ohio adopted legislation limiting bargaining and strike rights of public workers in March 2011, only to have it overturned by a wide margin in a November voter referendum. *See generally* U.S. GEN. ACCOUNTING OFFICE, GAO-02-835, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS (2002).

¹⁰⁴ Hawaii and Iowa provide for binding arbitration. New York requires arbitration in the event of an impasse. California and Oregon require forms of mediation and fact-finding.

¹⁰⁵ Alaska, Illinois, Minnesota, Montana, and Pennsylvania allow strikes, although after certain steps are completed. Colorado allows limited strike rights.

¹⁰⁶ Fischl, *supra* note 97, at 41 (citing Wisconsin Governor Scott Walker’s use of the phrase in Press Release, Scott Walker for Wisconsin Governor, Walker Outlines Blueprint to Bring 250,000 Jobs to Wisconsin (Sept. 16, 2010), *available at* <http://www.scottwalker.org/press-release/2010/09/walker-outlines-blueprint-bring-250000-jobs-wisconsin>, and South Carolina Governor Nikki Haley’s similar phrasing in John O’Connor, *S.C. Panel OKs Bill to Tweak State Operations*, SUN NEWS (Myrtle Beach, S.C.), Mar. 25, 2011, http://www.thesunnews.com/2011/03/25/2060188_sc-panel-oks-bill-to-tweak-state.html#ixzz1ekL47o3x).

participation. Rather, they champion the kind of authoritarian workplaces that prevail in the private sector, in spite of the promises of our national labor laws.

This brings us to one key difference between private and public sector labor law: you do not put your job on the line by “talking union” at a government workplace. That is because most public sector workers, at both the state and federal levels, are covered by civil service law and cannot be fired without “just cause.” If a union organizer or activist is fired in the midst of an organizing campaign, the public employer has the burden of showing that there was a good reason for the firing and that it was not in retaliation for taking part in the campaign. As a consequence of these laws (and the culture they have shaped), retaliatory firings and serious workplace reprisals for union activity are rare in the public sector.¹⁰⁷

By contrast, private employers are free to fire employees at any time for any reason at all, good, bad or indifferent, as long as the reason is not forbidden by some other body of law, like race or sex discrimination law—or like the NLRA, which, in theory, outlaws firings or reprisals for union activity.¹⁰⁸ It is the worker’s burden to show that the firing was to thwart the union campaign, but the employer can always claim that the reason for the firing was not talking to the union or organizing or attending a meeting—i.e., exercising one’s rights; instead, the motivation for the firing was “malingering” or “insubordination” or “lateness” or literally anything else; under employment-at-will’s “any reason” standard, the possibilities, as Fischl points out, are “limitless.”¹⁰⁹

Now, if an employer fires someone for reasons of race or sex, the recourse is to the federal courts and the plaintiffs’ bar. The sanctions are fairly certain and substantial. They include attorney’s fees as well as compensatory and punitive damages.¹¹⁰ To some important extent, employers have internalized the nation’s antidiscrimination laws and concluded that it is good business to abide by them, or at least to avoid their flagrant violation. Things are otherwise with the NLRA, which was, as Cindy Estlund recently has observed, our first antidiscrimination law, outlawing anti-union discrimination way back in 1935.¹¹¹ The constitutional values at stake in the statutory bar on anti-union discrimination remain clear: freedoms of expression, association, and of

¹⁰⁷ In one study of anti-union tactics in over one thousand certification elections, public employers were found to be much less likely than their private counterparts to use threats, harassment, coercion, and retaliatory firings during union election periods. See Kate Bronfenbrenner, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECON. POL’Y INST., 23–24 tbl.9 (May 20, 2009), <http://www.epi.org/page/-/pdf/bp235.pdf> (EPI Briefing Paper No. 235).

¹⁰⁸ 29 U.S.C. § 158(a) (2006).

¹⁰⁹ Fischl, *supra* note 97, at 48; Cynthia Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1670–78 (1996).

¹¹⁰ Estlund, *supra* note 13, at 1553–55.

¹¹¹ *Id.* at 1552.

peaceful concerted action in pursuit of common aims.¹¹² Yet, flagrant violations of these rights have become the rule, and the sanctions are seen as an ordinary cost of doing business and a small price to pay for thwarting a union organizing campaign. Unlike race or sex discrimination, with an anti-union firing, recourse is to the National Labor Relations Board where the process of filing a charge of anti-union dismissal through the inevitable judicial review takes on average two to three years, and the remedy is restricted to reinstatement and back pay less interim earnings: a small price in employers' eyes, as noted; and a host of studies confirm that a breathtaking percentage of U.S. employers make exactly that calculation. One recent study estimates that as many as one in five U.S. workers who supports a union campaign as an "activist" is unlawfully fired for her efforts.¹¹³ As Fischl observes, "it is well recognized that such discharges are highly likely to halt a union campaign in its tracks."¹¹⁴

Unlawful firings are but one of the typical incidents of private sector organizing campaigns. Accompanying such firings is the pervasive, well-documented use of countless other textbook violations of the NLRA: threats of firings, along with threats of job loss if workers vote union, interrogations of workers regarding their involvement or support of the union, discrimination in work assignments, and so on.¹¹⁵ This lawless world of union organizing in the private sector could not be more different from the context in which union

¹¹² Indeed, we will soon note that over the past half century, associational activity, boycotts and protests have all come to enjoy substantial First Amendment protection. In the labor context, however, the Court treats such activity as outside the constitutional pale. See *infra* note 137 and accompanying text.

¹¹³ John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns*, CENTER FOR ECON. & POL'Y RES., 1 (2007), http://www.cepr.net/documents/publications/unions_2007_01.pdf. Bronfenbrenner found discriminatory dismissals in 34% of NLRB elections from 1999 to 2003, see Bronfenbrenner, *supra* note 107, at 23 tbl.9. Professor Charles J. Morris puts the figure at a lower 1 in 18, although his data, covering the years 1992 to 1997, is from a period that Schmitt and Zipperer note for having lower rates of discriminatory dismissals when compared to the more aggressive anti-unionism of the 1980s and after 2000. See Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. & EMP. POL'Y J. 317, 330 (1998). A consideration of these different figures is in Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 684–85 (2010).

¹¹⁴ Fischl, *supra* note 97, at 49. Bronfenbrenner's survey of anti-union actions during representation elections found a strong correlation between the number and intensity of tactics used against unions and declining chances of election victory, and identified the firing of union activists (when they were not reinstated before the election) as a particularly effective tactic, see Bronfenbrenner, *supra* note 107, at 10–11 tbl.3. Morris, *supra* note 113, at 338, also confirms the significant chilling effect of activist firings.

¹¹⁵ Bronfenbrenner, *supra* note 107, at 9–14, catalogues dozens of such tactics. Sachs, *supra* note 113, at 680–91, also considers legal and illegal employer actions to defeat unionization drives, with particular emphasis on retaliatory dismissals and threats of plant closure.

campaigns unfold in the public sector.¹¹⁶ Nor do the differences and the rampant rights violations in the private sector end when, and if, workers vote in favor of union and then seek to bargain collectively with their employer.

3. *But What Do Workers Want?*

As we'll see, one need not transplant a full-blown civil service-style "just cause" regime to the private sector to remedy this lack of effective safeguards against anti-union reprisals. But before we start examining what can be done about the legal and constitutional scandals in private sector labor law, we should ask: Do these infirmities really matter from the point of view of private sector union density? Maybe people simply do not want unions. Most working people no longer toil in factories, mines and mills; they work in high- or, mostly, low-wage service sector jobs. They work in the information economy. They do not work a lifetime in the same firm. And maybe unions hold out little appeal for them. For that matter, maybe manufacturing workers have a jaundiced view of unions as well. There are vast literatures about all these parts of the employment landscape and about how well or badly unions and various other forms of association, labor representation and collective bargaining perform in them. We cannot begin to explore them systematically here. But we may ask: What do we know about what workers want?

A classic work with that title, *What Workers Want*, reports on a comprehensive and well-conceived, multi-year survey of private sector workers. There, Richard Freeman and Joel Rogers found that 32% of workers who were not represented by unions wished they were and that 90% of those who were wanted to stay that way. Together, the statistics imply "a desired rate of private sector unionization of 44%."¹¹⁷

Perhaps, then, as Fischl claims,

it is no coincidence that, in the one sector [the public sector] of the American economy where workers don't face the threat of job loss for their union efforts, union density rates closely approximate that 'desired' rate of unionization, and that employees who do face such a threat are organizing at a much lower rate.¹¹⁸

For as we noted, the density rate in the public employment sector is just over 40%, and the sheer variety of blue-, pink-, and white-collar occupations suggests that there is little in the make-up of the workforce that would predict a strongly different outlook on unionization.

Likewise, the fact that so many of these occupations cut across the public and private sectors—healthcare workers, janitors, transportation workers, for example—suggests that there is something to Fischl's point: "for the past

¹¹⁶ Bronfenbrenner, *supra* 107, at 23–24 tbl.9.

¹¹⁷ RICHARD B. FREEMAN & JOEL ROGERS, *WHAT WORKERS WANT* 17 (2006).

¹¹⁸ Fischl, *supra* note 97, at 52.

several decades we have . . . been running a natural experiment to determine the difference between union density rates for employees who must risk their jobs” and their pay checks to secure the material, dignitary and democratic gains of collective bargaining, and those employees who do not face those perils. The upshot is a substantial “democracy deficit.”¹¹⁹

4. *Rival Reasons for Divergent Union Density*

Fischl overlooks other possibilities. He does not discuss the advantages that public sector unions are thought to enjoy in virtue of bargaining with employer representatives who often are—or are accountable to—elected officials.¹²⁰ Thus, public sector unions enjoy two kinds of clout. While they usually cannot threaten a strike, they can at least threaten discontent and noncooperation; and, in addition, they can threaten retribution at the polls. How much this structural difference actually inures to the advantage of public over private sector unions is contested and empirically uncertain.¹²¹ It certainly does not account for the clear evidence that public employees are prepared to fight for collective bargaining rights in the name of dignity and democracy, even where their compensation is determined entirely outside the collective bargaining arena, in the legislature, and their unions would remain free to act as political lobbies, even absent collective bargaining rights.¹²² And in any case, this structural difference does not detract from the robust findings about what private sector workers want.

Another factor Fischl overlooks is this: Maybe, in the best of possible worlds, private sector employees would prefer unions and collective bargaining.

¹¹⁹ *Id.* at 54.

¹²⁰ Clyde Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156, 1159 (1974); see also Vijay Kapoor, *Public Sector Labor Relations: Why It Should Matter to the Public and to Academia*, 5 U. PA. J. LAB. & EMP. L. 401, 407–09 (2003).

¹²¹ Clyde Summers also provides a recent consideration of the political context of public sector bargaining in Clyde Summers, *Public Sector Bargaining: A Different Animal*, 5 U. PA. J. LAB. & EMP. L. 441 (2003). While Summers concludes that political participation by public employee union members may confer a potential bargaining advantage on issues with little public visibility, he argues that in matters of wages and benefits, the political activity of taxpayers more than offsets union member clout. *Id.* at 446–47. Public employee union critics argue that unions wield unwarranted bargaining power and influence on public policy because of political participation. See ROBERT S. SUMMERS, COLLECTIVE BARGAINING AND PUBLIC BENEFIT CONFERRAL: A JURISPRUDENTIAL CRITIQUE 3–9 (1976); HARRY H. WELLINGTON & RALPH K. WINTER, JR., THE UNIONS AND THE CITIES 24–29 (1971); Martin H. Malin, *The Paradox of Public Sector Labor Law*, 84 IND. L.J. 1369, 1372–82 (2009) (examining recent critical takes on this issue in the context of the federal workforce and public schools).

¹²² Fischl, *supra* note 97, at 54–56, quotes TSA screeners saying that their desire to “have any voice on the job” and a counter to “management’s . . . ‘our way or the highway’” attitude have driven their unionization drive, despite being prohibited from bargaining over wages and benefits to have a voice on the job. On the motivating desire for workplace democracy and dignity, see FREEMAN & ROGERS, *supra* note 117, at 76–77.

But perhaps they also credit employers' and politicians' claims that unions and collective bargaining thwart business efficiency and market competitiveness. So, a private sector worker may think: unionization, while preferable, could prove self-defeating. The firm would go under; I would lose my job.¹²³ Efficiency and competitiveness do not weigh nearly so heavily in the public sector; and that difference may be as significant as the undoubted fears and threats of firings and reprisals.

It seems likely to me that many private sector workers regard unionization in this light. But if so, they are being sold a misleading bill of goods. The economics of private sector unionization is complicated. But the bottom line across virtually all industries today is this: Unionization rarely brings down firms, and it regularly increases productivity.¹²⁴ The image of rigid, hide-bound unions stymying innovation and flexibility in the private sector workplace is largely bunk. With few exceptions, private sector unions have adapted to changing production imperatives and intensifying competitive pressures or they have perished. Private sector unions today collaborate with employers to find mutually beneficial paths forward. Given a fairer, objective view of the economic consequences of unionization, then, what is left for a private sector worker to ponder in deciding whether to act upon the wish for a collective voice at work is just what Fischl highlights: the very real threat of reprisal in a legal order that provides no meaningful protection against it.

D. Re-Inventing Labor Rights: Transformative Possibilities in Today's Low-Wage Labor Markets

1. Organizing for Workplace Democracy and Decent Work and Pay Outside the Broken NLRA Framework

Of course, for unions really to prove their mettle in intensely competitive, low-wage labor markets and create decent jobs in these markets, they must first put a floor under wages in the given market. This is a daunting task, but these

¹²³ Indeed, Bronfenbrenner, *supra* note 107, at 10 tbl.3, reports that employers threatened to close all or part of a plant in more than half (57%) of union elections studied. The actual rate of full or partial plant closure following elections was 15%. The gap between the two figures suggests employer threats to close plants are exactly that, rather than predictions made "on the basis of objective fact," as allowed under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). This point is made in Sachs, *supra* note 113, at 688–91.

¹²⁴ A study of firms unionized in the years 1984 to 1999 found that unionization had no impact on firm survival and an insignificant effect on employment levels. See John DiNardo & David S. Lee, *Economic Impacts of New Unionization on Private Sector Employers: 1984–2001*, 119 Q.J. ECON. 1383, 1386, 1410, 1428 (2004); Timothy Dunne & David A. Macpherson, *Unionism and Gross Employment Flows*, 60 S. ECON. J. 727, 736 (1994) (containing similar findings). Richard B. Freeman & Morris M. Kleiner, *Do Unions Make Enterprises Insolvent?*, 52 INDUS. & LAB. REL. REV. 510, 526 (1999), theorize that unions do not produce firm death because they will not press demands that could potentially "destroy the goose that lays the golden egg."

are the workplaces where the Distributive Constitution's precepts are most severely challenged. So we do well to take a closer look at these challenges and the performance of unions organizing low-wage, predominantly new immigrant and African-American workers in sectors that symbolize dead-end jobs, intensely competitive labor markets and poverty wages: janitors in big city office buildings, hotel and restaurant workers, home health care workers in the health industry. This is where labor organizing has taken on important aspects of a new civil rights movement; it will tell us something about both the possibilities of unionization in redressing some of our deepest distributive infirmities and the costs that a broken framework of labor rights exacts. It will also give us a glimpse of the constitutional black holes in the law governing labor protest and the possibility of eliminating them.

Unions like Service Employees International Union (SEIU) and HERE, the hotel and restaurant union, have won decent pay and benefits, worked with employers to fashion meaningful job ladders and training opportunities, and helped their predominantly new immigrant and African-American members gain political clout in cities as disparate as Los Angeles, El Paso, Philadelphia, Las Vegas, New York, and Atlanta.¹²⁵ Their organizing victories have demonstrated the restiveness and organizing prowess of these workers. But they also confirmed the extraordinary hurdles that the nation's legal order puts in the way of union organizers. Organizing along conventional legal lines means a protracted, procrastinating National Labor Relations Board bargaining unit determination and supervised union election process. Any determined employer can stymie this process, and as we have seen, pro-union workers have no real protection from reprisals. Besides, organizing one employer at a time leaves unionized employers at a disadvantage and their workers vulnerable.

Faced with these realities, the unions have turned to bold industry-wide, community-based strategies outside the framework created by the NLRA. They have reinvented the kinds of mass organizing campaigns and political alliances forged by unions of unskilled new immigrant workers at the turn of the last century who also confronted a hostile, legal order. They rely on private reconstruction of organizing and bargaining rules by unions and employers. The virtue of this approach is that it enables unions to leverage clout in other locales and related industries or in the local polity to work around the harsh confines and toothless safeguards of the NLRA. The weakness is that absent the NLRA framework, an employer has no legal obligation to enter such a private agreement or engage the union in bargaining. So only unions with some source of ex ante power can benefit from these old-fashioned private mechanisms.

But unions like HERE and SEIU have developed canny new strategies aimed at today's national and international corporate structures. SEIU's Justice for

¹²⁵ See generally Laura Dresser & Joel Rogers, *Part of the Solution: Emerging Workforce Intermediaries in the United States*, in GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIMENTS 266 (Jonathan Zeitlin & David M. Trubek eds., 2003).

Janitors campaigns, for example, do not simply negotiate and bargain with the office-building service contractors in the cities where its members work. Instead, the union has tracked the growing consolidation of building maintenance companies and of the ownership of downtown high-rises around the nation. Members of one local union fly across the country to sit in at bargaining sessions of another locale, and a nationwide bond has developed among the janitors. This solidarity underlies the threats the international's leaders can convey to national owners and contractors: If the locale on strike in Los Angeles sends one picket to a building cleaned by the same employer, or owned by the same real estate investment trust in New York, the New York janitors will not clean the building.¹²⁶ Often, building owners bring fierce pressure on contractors to settle. Meanwhile, the wages of L.A.'s downtown janitors have risen from the minimum wage prior to unionization to roughly twelve dollars an hour today. The union locals' new immigrant membership has mastered the arts of democratic self-rule in union governance and mutual aid and advocacy in grievances against employers; they also played a signal role in electing that city's first Hispanic mayor in more than a century and a veteran union organizer himself.¹²⁷

Decent wages and a democratic voice at work are two dimensions of social citizenship poor Americans overwhelmingly lack. Another is serious job training and real opportunities to make the most of one's talents and energy. Philadelphia's Hospital and Health Care Workers Union (HHCWU) has built genuine career ladders into the structure of that city's health care industry, enabling tens of thousands of workers to move up from what hitherto had been dead-end jobs with high turnover and low wages. An employment center, funded and managed by labor and management partners, serves as a hiring hall, offers career counseling, and runs dozens of training programs from basic literacy to specific health care certifications. Serving both workers' and employers' needs, HHCWU has secured for itself a critical place in the city's health care labor market, and used it both to improve job quality and to create opportunities to move from, say, home health care aides to certified nursing assistants, or from CNAs to more specialized therapists. HHCWU has prevailed on employers to promote from within and to provide on-site apprenticeships, training courses, and hours off and tuition reimbursement for continuing education. HHCWU also has gained a key role in the reevaluation of jobs to relieve overwork and make pay scales reflect higher competencies and skilled tasks within a job category. All these reforms were

¹²⁶ See also Jennifer Luff, *Justice for Janitors*, in *ENCYCLOPEDIA OF U.S. LABOR AND WORKING-CLASS HISTORY* 729, 729–31 (Eric Arnesen ed., 2007). See generally Roger D. Waldinger et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, in *ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES* 102 (Kate Bronfenbrenner et al., 1998).

¹²⁷ The SEIU and Los Angeles County Federation of Labor were early backers of Antonio Villaraigosa in his unsuccessful 2001 mayoral campaign and successful 2003 city council run. While leadership endorsed the union-friendly incumbent mayor James Hahn in the 2005 race, many members continued to support Villaraigosa, playing a crucial role in his election. See generally Marc Cooper, *When Liberals Collide*, *NATION*, Mar. 14, 2005, at 20.

negotiated between hospitals and the union; and both consider them win-win propositions. The union ensures opportunities for its members, and the hospitals reduce turnover and save money in outside training and recruiting.¹²⁸

Even more than health care, work in hotels, especially housekeeping and food and beverage work, is seen as a low-wage, dead-end job. “Unions in the industry have done much to improve the quality of these jobs in traditional ways”¹²⁹ But in several cities, HERE has fashioned labor/management partnerships— analogous to the health care partnership in Philadelphia—which have changed the architecture of work in new ways, benefiting both hotel companies and hotel workers. The logic of these partnerships has been to provide job security, solid pay, continued job training, and genuine career ladders for hotel workers (often recent immigrants and often former welfare recipients), while, at the same time, overcoming severe recruitment, retention, flexibility, and skill deficit problems on hotel management’s side.¹³⁰ These union-management consortia have become known as premier sources of training and good jobs; they are premier examples of social citizenship at work.

Had we world enough and time, we could turn from these experiments in the low-wage labor market to other collaborations and consortia that have improved not only productivity but also training, advancement, and career paths for workers throughout an economic sector, be it manufacturing, insurance and banking, or health care, to cite prominent examples.¹³¹ All these collaborations rest on the same insight: Employers have two broad ways to respond to new competitive pressures—a “low-road strategy” that typically focuses solely on reducing costs of production or service delivery, and a “high road” one that also looks to improve service or product quality or distinction, with some of the premium paid by customers passed along to the typically better trained workers who helped produce it. Generalized across a labor market, low-road strategies lead to sweated workers, economic insecurity and rising inequality; high-road strategies to higher productivity, higher pay, and more egalitarian labor relations, along with the promotion of broad and continuous skill upgrading.¹³²

High-road strategies conduce to social citizenship. Low-road strategies in the lower regions of the labor market lead to conditions, which, from a progressive perspective, are not only socially destructive, but constitutionally infirm. That is why I have focused on HERE’s and SEIU’s successful efforts to steer low-wage employers onto the high road.

¹²⁸ Dresser & Rogers, *supra* note 125, at 279–80.

¹²⁹ *Id.* at 276.

¹³⁰ *Id.* at 276–77.

¹³¹ *Id.* at 279–84; see also Annette Bernhardt, Laura Dresser & Joel Rogers, *Taking the High Road in Milwaukee: The Wisconsin Regional Training Partnership*, WORKING USA, Winter 2001–2002, at 109.

¹³² See comparison from Dresser & Rogers, *supra* note 125, at 271.

2. A Few Paths of Legislative Reform

None of these union success stories should delude us, however. Union organizing, especially in the low-wage labor market, remains a Herculean task. These experiences yield suggestions for reforms that would make the task vastly easier. But unified employer opposition to any such reform is no less entrenched than was the old solid South against civil rights laws. Legislation in support of labor rights will come, if at all, only if the labor movement once more takes on the aspect of a civil rights movement. That will require many more costly campaigns like Justice for Janitors. And these will continue to involve blistering publicity campaigns and boycotts that employers will greet with libel suits, RICO suits, and restraining orders, all in the context of hard-fought strikes, picketing, and militant protests that will be met by injunctions and mass arrests. Surprisingly, this opens some real opportunities for making constitutional change in the courts. So, I will quickly sketch some possible lines of legislative reform; then, I will sketch some doctrinal possibilities.

Organizing the unorganized should not entail enormous costs for unions or for unorganized workers themselves. Thousands of workers are fired each year for exercising the right to “talk union” to their fellow workers. That is because our labor laws supply no real protection, and enable any determined employer to kill any organization that tries to follow the legally prescribed path. Firing workers for talking union should face the same kind of tough sanctions as other illegal firings based on race or sex. The nation’s first antidiscrimination employment law is the only one that lacks the strong remedies of compensatory and punitive damages. A private right of action against anti-union discrimination would mean that labor law enforcement no longer rested solely with a weak agency. Individual and aggregate suits could be brought in federal trial courts, where the prospect of large damages judgments would enlist the private plaintiffs’ bar and make employers pay attention.

As a matter of fact, the advantages of swift and tough judicial action have led innovative advocates for low-wage workers to build organizing campaigns around shared workplace grievances that constitute violations of Title VII or other statutes that provide such judicial relief, even though these statutes were not conceived as vehicles or safeguards for workplace organizing and collective action. The key is that Title VII contains a prohibition on retaliating against employees who bring complaints against employers for violating the statute’s bars on discrimination. So, too, does the Fair Labor Standards Act (FLSA), which prescribes minimum wages, maximum hours and other employment standards, and protects, via a private right of action, against retaliation for bringing complaints under those standards. Thus, advocates and organizers of low-wage immigrant workers have been able to mount protests and stage pickets and demonstrations against shared grievances—like low wages or sex discrimination in a garment factory or big city restaurant—and by also framing the grievance as a complaint under the relevant statute, they not only gain an added measure of bargaining leverage but also gain surprisingly robust

safeguards against the predictable firing of union activists. When the employer has discharged the campaign's leaders, advocates have gone to federal court alleging unlawful retaliation and won preliminary injunctions ordering reinstatement. In stark contrast to organizers' experience under the NLRA, these decrees have come within days, not years.¹³³

Of course, recourse to Title VII or the FLSA is only available when the workplace grievances that arouse and enlist the energy and courage of workers fall under the statutes' prohibitions. Most grievances do not. And these statutes offer no protection for workplace organizing or union activity as such. Thus, experience with them only confirms the desirability of a private right of action for anti-union discrimination.

Other reform paths are also possible and essential. Our labor laws must be reformed to make the organizing campaign less costly and fraught with risks. The present union election system requires organizers to sign up a substantial number of employees before they can petition the labor board for a certification election; even if the union can produce cards signed by an overwhelming majority of workers, the employer isn't required to recognize and deal with the union based on that informal showing. Rather, that showing merely alerts the employer that an organizing effort is underway and invites it to mount a protracted and threatening counter-campaign. The Employee Free Choice Act, which labor sought and failed to get during the first two years of the Obama Administration, addressed this problem by making the signed cards suffice for union recognition. Like every other important labor law reform sponsored by labor over the past several decades, it met the united resistance of employers; and it garnered only lukewarm Democratic support. The latter was partly because the card-check alternative swept aside the secret ballot.

Most Canadian jurisdictions rely simply on the union's authorization cards for certification. Two Canadian provinces have a somewhat more elaborate procedure that many U.S. reformers now favor.¹³⁴ These provinces use quicky elections; if the union has more than a bare majority ready to sign up and pay a minimum fee as a token of seriousness, then the board conducts an immediate election. That way, employees still get an opportunity to have second thoughts and can express their final views in the secrecy of the voting booth (or via an online ballot), but there is no extended campaign during which management can pressure employees. The choice, after all, is theirs. And employers, after all, would remain free to speak out against unions as a general matter whenever they please.

HERE's and SEIU's experiences also commend statutory reform authorizing "sectoral bargaining." Aimed especially at low-wage sectors like office-cleaning, restaurant, nursing home, and home health care workers, which often combine highly dispersed work sites with highly uniform work conditions, this reform

¹³³ See Benjamin Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2696 (2008).

¹³⁴ Sachs, *supra* note 113, at 718–19 (endorsing rapid elections, although remaining somewhat skeptical of the NLRB's ability to implement a new election regime).

would enable a union demonstrating support among workers at different sites to bargain jointly with all the employers. In subsequent organizing during the term of the resulting contract, union certification at additional sites would automatically add the employers at these sites to the group covered by the contract, and the employers would join in the multi-employer bargaining in the next round. This reform would enable unions to bring the benefits of wage stability and the “leveling up” of competition to industries like office cleaning, with far less costly organizing than is required of SEIU and HERE today.

3. *Congressional Hearings and Labor Rights*

But just as the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were not passed until the Civil Rights Movement had mobilized support and mounted protests throughout the country, so it is likely to be the case here. Labor law reform will happen if and when the labor movement once more takes on the aspect of a civil rights movement. That calls for great internal changes in many of the nation’s unions to imbue movement energy, aspirations, and rights claims into union campaigns; but it is also a matter of restoring the links between labor rights and American liberties and democracy. It means taking a leaf from the Progressives and New Dealers who held widely publicized hearings on the illegalities and violations of basic rights by employers bent on thwarting union organizing. We need a congressional investigation which exposes and holds up to public shame the key personnel and key practices of the union avoidance law firms, private security companies, and personnel departments to demonstrate the cynicism and illegality rife in this segment of corporate America. Pro-union members of Congress need to rekindle, in spirit, energy, and human resources, the committee once made famous by Wisconsin Senator Robert La Follette, Jr.: a subcommittee of the Senate Committee on Education and Labor which for four years, 1936–1940, sought to “drain the industrial swamp” by investigating “violations of the rights of free speech and assembly and undue interference with the right of labor to organize and bargain collectively.”¹³⁵ The linkage between the rights of labor and the abridgement of free speech and assembly was central: it was the La Follette *Civil Liberties* Committee.

4. *First Amendment Doctrine and the Ever More Anomalous Position of Labor Protest*

Until Congress investigates and acts, union organizing will entail more costly campaigns like Justice for Janitors. And these will continue to involve blistering publicity campaigns and boycotts that employers will greet with libel suits, RICO suits and restraining orders, alongside hard-fought strikes, picketing, and militant protests that will be met by injunctions and mass arrests. Surprisingly, these attacks have opened real opportunities for making constitutional change in the

¹³⁵ See Auerbach, *supra* note 47, at 440.

courts, and this may help change the public face of these labor contests into civil rights struggles.

Many advocates think these campaigns may be the context in which the federal courts finally recognize the constitutionally protected status of union boycotts of "unfair" businesses; and finally resurrect the short-lived constitutional right to picket over a labor grievance—a right they recognized briefly in the 1940s, but interred in the 1950s.¹³⁶

No matter whether an organizing campaign or a strike or boycott is inside the NLRA framework or not, labor picketing goes constitutionally unprotected. The Court thrust picketing outside the First Amendment pale in the 1950s, and reaffirmed that exile in a series of cases concluding in 1980.¹³⁷ The rationales on which the Court has relied are roughly three-fold: (1) picketing is not speech, but speech plus conduct; (2) picketing has elements of threat and coercion; and (3) picketing is conduct that appeals to an unthinking, reflexive response (class solidarity).

None of these bases for exclusion has any life left in it. The mounting vigor of the Court's commitment to robust First Amendment protection for all manner of expression suggests that its interest in consistency finally may outweigh its anti-labor bias. Symbolic or expressive conduct now enjoys First Amendment safeguards in contexts where "speech," as opposed to "conduct," plays a less prominent role than in labor picketing: Flag-burning, cross-burning, nude dancing and St. Patrick's Day parades all come to mind.¹³⁸ One also is hard-pressed to find much of an appeal to reason in any of these protected forms of expressive conduct. Yet, First Amendment doctrine continues to exclude labor picketing from the fold because the message conveyed by union pickets is a mere "signal"—an appeal to class feelings rather than an appeal to reason. As Alan Hyde observed, this is "insulting to working people and their allies. But most importantly, it is constitutionally irrelevant; the First Amendment is not limited to appeals to reason. Not since it began protecting nude dancing. Or cross burning."¹³⁹ Finally, as far as threat and coercion are concerned, the Court has provided significant First Amendment safeguards for civil rights pickets and racist cross-burners in contexts involving conceded threats and intimidation. Only labor picketing goes

¹³⁶ James G. Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 112–13 (2002); see also Estlund, *supra* note 13, at 1582–83.

¹³⁷ For a recent discussion of the cases, culminating in *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980), exiling labor picketing from First Amendment protection, see Hyde, *supra* note 13.

¹³⁸ On cross burning: *Virginia v. Black*, 538 U.S. 343 (2003); St. Patrick's Day Parade: *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995); nude dancing: *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); flag burning: *Texas v. Johnson*, 491 U.S. 397 (1989).

¹³⁹ See Hyde, *supra* note 13, at 267.

unprotected, even where statutory prohibitions require no proof of intent to intimidate or actual intimidation and none is shown.¹⁴⁰

When one considers the Court's 8–1 vote last term in favor of full First Amendment protection for the “raucous,” in-your-face, anti-gay pickets at a soldier's funeral,¹⁴¹ one begins to see that the whole push of doctrinal development has reached a point where the Court may be ready to revisit labor picketing.

Like labor picketing, the scanty First Amendment protection enjoyed by labor as compared to community or civil rights boycotts rests on notions that fitted the doctrinal landscape decades ago, but not today. Above all, the rationale for not extending full First Amendment protection to labor boycotts has been that labor boycotts simply involve one self-interested economic actor seeking to inflict economic injury on another, whereas community boycotts involve matters of common public political concern like civil rights.¹⁴²

This vexed notion seems especially vulnerable in the face of today's “corporate campaigns” like those waged by HERE and SEIU. This kind of organizing and boycotting has spawned labor-community alliances that dramatize the artificiality of the opposition of “economic” versus “political” or labor versus community and civil rights protest. Organizing campaigns today, in predominantly African-American or Hispanic and new immigrant workplaces, engage the local NAACP, local politicians, clergy and community leaders, and immigrant rights organizations, all of whom view the campaign in terms of community uplift and civil rights. Thus, campaigns like these may enable progressive attorneys to revive the courts' short-lived understanding of the public, political nature of labor grievances and weave the strands of First Amendment protection enjoyed by community-based pickets and civil rights protestors back into labor law. What better way to make constitutional doctrine begin again to reflect the convictions that decent work and livelihoods are basic to our democracy, and that unions are about enfranchising workers?

IV. CONCLUSION

Which brings us back to the attacks on social provision: Obamacare; Medicaid and Medicare; Social Security. Conservative judges on the High Court and in the federal trial courts have begun to channel the old laissez-faire and anti-redistributive doctrines back into current law.¹⁴³ More broadly, the Tea Party and its voices in Congress are pressing their constitutional case against

¹⁴⁰ *Id.* at 268.

¹⁴¹ *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

¹⁴² James G. Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 544–50 (2004).

¹⁴³ *Citizens United v. FEC*, 130 S. Ct. 876, 917 (2010); *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011).

public social provision.¹⁴⁴ It is time for progressives to see the deep flaws in a response that claims nothing more than that the New Deal interred “liberty of contract” and laissez-faire. For when we speak of the political Constitution—of the Constitution in its full reach, rather than the adjudicated Constitution—progressives ought to know that the Constitution does speak substantively to distributive issues. It calls on lawmakers and the democratic process to honor the distributive commitments we have outlined here.

The former constitutional law professor in the White House has had some eloquent words to say about the Constitution and its commitments. In characteristically muted fashion, Barack Obama’s familiar narrative echoes the account of the progressive Constitution I have sketched. It starts by proclaiming fidelity to the founders, the “brave band of settlers” and “colonists.”¹⁴⁵ In the next breath, though, it affirms that the Constitution is a work-in-progress, transformed by Civil War, Reconstruction, and later amendments.¹⁴⁶ And recall the key words in Obama’s constitutional phrase book: “a more perfect union.”¹⁴⁷ Progressives could gain a firmer footing on the contested ground of racial justice in the twenty-first century by attending to what Obama has had to say about the “part of our union that we have yet to perfect.”¹⁴⁸

When Obama talks in this constitutional key, it is the tangled knot of race and class at the heart of the narrative that he evokes: “the complexities of race in this country that we’ve never really worked through.”¹⁴⁹ The President recounts the New Deal programs that provided unions and good jobs, housing loans, and other opportunities for white America and left blacks in the cold, with a legacy of poverty many have not yet overcome.¹⁵⁰ Today, however, many white Americans have come to resent affirmative action and civil rights laws because they have been abandoned by a plutocratic government and “a corporate culture rife with . . . greed . . . [and] economic policies that favor the few over the many.”¹⁵¹ Obama laments that they come to see opportunity “as a zero sum game, in which your dreams come at my expense.”¹⁵²

The Constitution, then, promises real equality of opportunity; it calls on all three branches of the national government to ensure that *all* Americans enjoy a decent education and livelihood, a measure of freedom and dignity at work, a chance to engage in the affairs of their communities and the larger society, and a chance to do something that has value in their own eyes. These are key parts of the liberty and equality that America promises everyone. It means that

¹⁴⁴ Kate Zernike, *The Constitution Has Its Day, and a Struggle for Its Spirit Breaks Out*, N.Y. TIMES, Sept. 17, 2011, at A13.

¹⁴⁵ Senator Barack Obama, *The America that We Love* (June 30, 2008).

¹⁴⁶ Senator Barack Obama, *A More Perfect Union* (Mar. 18, 2008).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See id.*

¹⁵¹ *Id.*

¹⁵² Obama, *supra* note 146.

Congress has not only the authority, but the duty, to govern economic and social life to underwrite these promises; and the judiciary has the duty to ensure that the vulnerable are not callously excluded.

This broad constitutional narrative is no less venerable and resonant than the Republicans' story of rugged individualism, free enterprise, and the rights of property. And like the latter in the hands of conservatives, this progressive narrative may flow from the broader realm of constitutional politics and culture into the interpretive judgments a liberal-minded judge makes, as she decides not only headline-grabbing constitutional issues, but questions of statutory construction, federal preemption, and the like.

Our national constitutional dialogue is still without a strong defense of the basic precepts of the progressive constitutional tradition. Progressives' methodological debates about responding to right-wing originalism are important, but they miss the bigger picture. None of the rival interpretive strategies stand much chance in the public debates they hope to sway unless it is wedded to a narrative about the values the Constitution embodies and the promises that faithful interpretation of the Constitution is supposed to keep. In a moment of great economic pain and growing inequalities, the moral and political insights of the progressive constitutional tradition have never been more apt. A Brandeis or Roosevelt would not pretend to know how to fix our post-industrial political economy, but he would say that we cannot keep liberal democracy without some measure of social democracy. The deep fears of hitherto secure "middle class" Americans that they or their offspring will end up impoverished ensure that if these problems are not addressed, there may well be an illiberal, authoritarian set of responses over the next generation.

Advocates, scholars and policy mavens are alive to the crisis of labor rights and its role in our mounting inequalities. They have begun to produce an array of both modest and bold reform ideas. We have sampled only a few, and left many of the bolder ones on the shelf. Every difference in the rules of the game can make a difference, however, and modest changes may eliminate major barriers to workplace organizing; stronger unions, in turn, may muster support for bolder legislative measures. The labor movement was on the ropes in the 1920s, only to be reborn in the 1930s. One cannot predict whether or when labor protest and organizing campaigns will resonate with broadly felt public grievances, and when hearings on corporations' systematic violations of workers' rights and liberties might again help catalyze transformative legal change.

For that to occur, however, Americans may need to see our economic woes framed once more in progressive constitutional terms. All the policy ideas to solve our current impasse face severe political headwinds. Progressives need to argue there are constitutional stakes in overcoming them. They need to demand that we address our unequal and unfair society as though our constitutional democracy depended on it. After all, it does.

